

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

**CRIMINAL WRIT PETITION NO. 4428 OF 2019
WITH
CRIMINAL WRIT PETITION NO.4429 OF 2019**

Jaysheree Daulatram Kawle

Petitioner

Versus

1. Lata Rajendra Soni

2. State of Maharashtra

Respondents

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Mr. Sanjay Bhatia, Advocate for the Petitioner in both Petitions.

Mr. Kuldeep S. Patil, Advocate for Respondent No.1.

Mr. M. G. Patil, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 30th SEPTEMBER, 2022

PC :

1. The petitioner in both the petitions is tried for offence under Section 138 of Negotiable Instruments Act. These petitions impugn orders passed in C.C. No.1193/SS/2015 and C.C. No. 1194/SS/2015 pending before the Court of learned Metropolitan Magistrate, 70th Court, Mazgaon, Mumbai.

2. In Criminal Writ Petition No.4428 of 2019, the petitioner has challenged order dated 29.06.2019 passed

by learned Metropolitan Magistrate, 70th Court, Mazgaon, Mumbai rejecting the application below exhibit-74 preferred by petitioner for calling Nodal Officer as a witness in C.C. No. 1193/SS/2015. Whereas Criminal Writ Petition No.4429 of 2019 is preferred challenging order dated 29.06.2019 passed by learned Metropolitan Magistrate, 70th Court, Mazgaon, Mumbai below exhibit-72 in C.C. No.1194/SS/2015, rejecting the application for witness summons to direct the Sales and Vat Tax Department to produce sales and vat tax payment details of complainant.

3. Learned advocate for the petitioner submitted that the impugned orders are contrary to law. Opportunity should be given to the petitioner to defend herself. Application exhibit-74 was preferred on 30.04.2019 for issuing witness summons to Nodal Officer of Vodafone. The examination of said witness is necessary for just decision of case. The complainant and accused had exchanged SMS messages between them from their mobile numbers. The SMS messages are not exhibited and marked as Article. The complainant and the accused were in relationship and exchanged several messages between themselves. Cheques were misused by complainant. The accused had

requested complainant to return the cheques, which were given for *bhisi* transactions. Unless the witness is summoned, the document marked 'Article' cannot be exhibited. Grave prejudice would be caused to petitioner. The learned Magistrate has committed error while rejecting application exhibit-74. Both the applications were distinct. The true fact would be revealed upon cross-examination based on the documents. The respondent had suppressed material fact. The petitioner is trying to prove that the respondent had not only suppressed material fact but also gave false evidence. The learned Magistrate has erroneously rejected application exhibit-72. The complainant had alleged that she paid VAT and Sales Tax on the alleged transaction. The *challan* bears no signature or acknowledgment. It is a fabricated document. No VAT or Sales Tax are paid on the said transaction. It is necessary to summon the witness from department of sales Tax to produce Sales Tax and VAT payment for the period April 2014 to March 2015. The said witness is material witness for just decision of the case.

4. Learned advocate for respondent in both the petitions submitted that the applications were preferred by petitioner

to delay in the trial. The applications were devoid on merits. There is no illegality in the orders passed by learned Magistrate. The accused preferred repeated applications. The applications were vague. During cross-examination of the complainant, the accused did not put any suggestion that she had sent or received any messages from the said cell numbers. Similar applications filed in the past were rejected. Reliance is placed on order dated 18.11.2016 passed by this Court in Writ Petition No.3688 of 2016.

5. The petitioner is prosecuted for offence under Section 138 of the Negotiable Instruments Act vide C.C. No.1193/SS/2015. The affidavit in evidence of complainant was filed in aforesaid complaint. The complainant was cross-examined at the instance of the accused on 01.04.2016, 05.05.2016, 04.01.2017, 27.07.2017, 02.08.2017. Similarly affidavit of examination-in-chief was filed in C.C. No.1194/SS/2015 by complainant. Cross-examination was conducted at the instance of accused on 07.09.2017. The petitioner preferred joint application exhibit-61 in C.C. No.1193/SS/2015 and C.C. No.1194/SS/2015 purportedly under Section 91 of Cr.P.C., contending that the complainant had falsely stated that

accused was present at his shop situated at Dongri and purchased jewellery. The mobile call data records with cell tower location information for mobile number 9869261684 would expose the false claim of complainant that she was present at shop on 07.04.2014. It will also reveal that complainant and accused were in relationship and had exchanged several messages between themselves for misuse of cheques by complainant and requested complainant to return the cheques, which she had given towards *bhisi* transactions. Hence, the Nodal Officer be directed to provide CDR with cell tower information of Vodafone cell No.9869261684 for the period April 2014 and text SMS messages exchanged between Vodafone cell No 9869261684 and cell No.9821075418 for a period July to October 2013. The petitioner has not annexed copy of order passed in application exhibit-61. The petitioner preferred application exhibit-67 in C.C. No.1193/SS/2015 on 02.08.2018 for issuing summons to service provider of the complainant to produce messages records from Vodafone cell No.9821075418 to cell No. 9869261684. It was contended that it is the case of accused that cheques were misused by complainant, as they were given to complainant as security for chit fund started by complainant. Xerox

copies of SMS's were produced. The messages were between accused and complainant to return cheques as she was not interested in chit fund. Hence, summons be issued to service provider of complainant to rebut the complainant's case. The application was opposed by complainant vide say exhibit-68. The learned Magistrate vide order dated 01.11.2018 rejected application exhibit-67 in C.C. No.1193/SS/2015. While rejecting the said application, it was observed that the accused had attempted to canvass the same prayer vide application exhibit-61 which came to be rejected vide order dated 15.06.2018. By way of said application, prayer was made for production of call details along with calling of Nodal Officer of the service provider mobile company as a witness. The details of call record are not vital to the present case, as the case is under Section 138 of Negotiable Instruments Act. There is nothing in the cross-examination of CW-1 to co-relate such messages, even if they are in existence with that of transaction in dispute. Therefore, the application is devoid of any merit and it deserves to be rejected. The petitioner than preferred application exhibit-74 in C.C. No.1193/SS/2015 on 30.11.2019. In this application it was contended that the

accused and complainant have exchanged SMS from their mobile phones. The messages are not exhibited and marked as 'Article'. The complainant and accused were in relationship and exchanged several messages between themselves and misuse of cheques by complainant and requested complainant to return the cheques which were given for *bhisi* transactions. Unless the witness is summoned, the document 'Article' cannot be exhibited. Hence, Nodal Officer is material witness and examination of said witness is necessary. Grave prejudice would be caused if witness is not summoned to produce documents. Hence, Nodal Officer be directed to produce text messages exchanged between Vodafone cell No. 9869261684 and cell No.9821075418 for period July to October 2013. This application was rejected by order dated 29.09.2019. While rejecting the said application it was observed that similar kind of applications were filed by the accused at exhibit-61 and 67. Both applications were rejected. While rejecting application exhibit-67 it was observed that the accused has attempted to canvass the same prayer vide application exhibit-61 which was rejected by order dated 15.06.2018. After recording statement of the accused under section 313 of Cr.P.C. the accused for same reason filed similar kind of

application on record. The conduct of the accused itself shows that the accused is trying to prolong the matter. The case is more than 4 years old. In C.C. No. 1194/SS/2015 the petitioner preferred application exhibit-64 on 02.08.2018. It was prayed that summons be issued to service provider of complainant to produce messages records from complainant's cell No.9821075418 to accused cell No. 9869261684. It was contended that cheques were misused by complainant. The cheques were given as security for chit fund. Xerox copies of messages between accused and complainant are produced. The messages would show that accused was not interested in chit fund and cheques should be returned. Hence, summons be issued to service provider of complainant to rebut complainant's case. The application was filed on 02.08.2018. The application was rejected by order dated 01.11.2018. It was observed that similar application was rejected vide order dated 15.06.2018. The petitioner thereafter, preferred application exhibit-72 on 30.04.2019. It was prayed that department of Sales and VAT Tax be directed to produce Sales and VAT Tax payment details of complainant. The said application was rejected vide order dated 29.06.2019.

6. The accused is trying to delay the proceedings. The accused has filed similar applications. The previous applications were rejected. Assuming that application exhibit-72 preferred in C.C. No.1194/SS/2015 relates to documents sought to be produced from Sales Tax Department, no case is made out for granting such application. The other applications are identical in nature. The complaints relate to offences under Section 138 of Negotiable Instruments Act. Complaints are pending since 2015. The learned Magistrate has rightly rejected the applications. No interference is warranted in impugned orders. Both the petitions are devoid of merits.

7. Hence, I pass the following order:-

ORDER

Criminal Writ Petition Nos.4428 of 2019 and 4429 of 2019 are rejected and disposed off accordingly.

(PRAKASH D. NAIK, J.)