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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPLICATION NO. OF 2017

IN

CRIMINAL CONTEMPT PETITION NO. 03 OF 2017

District : Mumbai

Ashiq A. Merchant

Add : Flat No. 504, Hicon's
Residency, 26th Road, Bandra (W),
Mumbai – 400 050.

..... Applicant

Vs

1. Bombay Bar Association
Through its Vice President
Mr. Nitin Thakkar



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2. Advocates Association of Western India
Through its Honorary Secretary
Mr. Viresh PurwantRespondents

**APPLICATION FOR CALLING WITNESSES IN WITNESS BOX
FOR THEIR CROSS-EXAMINATION AND FURTHER ORDER
OF CONDUCTING THE NARCO-ANALYSIS TEST OF
WITNESSES**

Respondent No. 10 Ashiq Ali Merchant most respectfully
submits as under:

1. The present application is arising from the Contempt
Petition filed by Bombay Bar Association (BBA) and
Advocates' Association of Western India (AAWI) on 14th
Feb 2017, in this Hon'ble Court.
2. It is the contention of the Petitioners that all the 14
respondents are alleged to have caused contempt of this
Hon'ble Court by their acts of conducting sting operation
of court proceedings, expressing their grievances through
interviews on social media with false allegations of
corrupt practices of sitting judges of the Bombay High
Court – Justice Shri. S. J. Kathawalla in particular (as in
case of Respondent No. 1-10) and facilitating the



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broadcast of these interviews on the internet (as in case of Respondent 11-14).

3. The immediate cause which triggered the alleged contemptuous act was an order passed by Justice S. J Kathawalla in Notice of Motion No. 2448 of 2016 in Suit No. 471 of 2016 on 8th Feb 2017.
4. The version of respondents and more particularly of respondent No. 10 is that in the aforementioned order dated 8th Feb 2017 is that Justice S. J. Kathawalla has blatantly and willfully refused to record the deposition of Public Servant - Talathi , who was hub of the issue of deciding the issue of authenticity of one of the two different Mutation Entries of same number produced by two parties to the suit and whose deposition, if recorded, would have compelled Justice S. J Kathawalla to pass an order contrary to what he actually passed. And therefore it proves that Justice S. J Kathawalla acted with corrupt and oblique motive and therefore he is liable to be punished.
5. That the Respondent No. 10 (Mr. Ashiq Merchant) has lodged a formal complaint to the Hon'ble President of India, Hon'ble Chief Justice of India, Hon'ble Chief Justice of Bombay High Court on 9th Feb 2017, regarding this impugned order and has also filed an



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appeal against the impugned order. A copy of which is enclosed herewith and marked as **Exhibit - 'A'**.

6. The version put forth by petitioners' in their petition is that Shri. Justice S. J. Kathawalla done no wrong, he has performed his duty in a judicious manner. The petitioners' version is false, misleading, twisted and dishonestly concealed and presented in a distorted manner before this Hon'ble Court.

7. Needless to mention here that the copy of the complaint **Exhibit - 'A'** was given to Shri. Justice S. J. Kathawalla, on 9th Feb, 2017 but he don't raised any objection about the allegations leveled against him. This is implied admission on the part of Shri. Justice S. J. Kathawalla.

This fact was deliberately and conveniently suppressed by the petitioners and their advocates and Counsels.

8. The petitioners have not filed any authorization from Shri. Justice S. J. Kathawalla or the said counsel against whom the allegations are made by Respondent No. 10 to make such grievances on his behalf.

9. It is trite law that the "**person aggrieved**" has to make the complaint or otherwise if the person aggrieved had accepted the allegations then entire proceeding will be futile exercise and will waste valuable time of the Court and also that of the respondents.



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10. Therefore, it is necessary that at the first instance the Shri. Justice S. J Kathawalla be called in to witness box and respondents be allowed to cross examine them.
11. Hon'ble Supreme Court in the case between Sahdeo @ Sahdeo Singh Versus State of U.P. & Ors , (2010) 2 SCC (Cri.) 451, ruled as under CASE NOTE :

A) Contempt Proceedings - Right to cross - examine witnesses - Framing of Charge - specific charge has to be framed in precision - the alleged contemnor must be given an opportunity to cross-examine the said witnesses provided it is so asked by him.- in contempt proceedings the court must conclude the trial and complete the proceedings "in accordance with the procedure prescribed by law.

- Held, However, contempt proceedings being quasi-criminal in nature, the same standard of proof is required in the same manner as in other criminal cases. The alleged contemnor is entitled to the protection of all safeguards/rights which are provided in the Criminal Jurisprudence, including the benefit of doubt. There must be a clear-cut case of obstruction of



administration of justice by a party intentionally to bring the matter within the ambit of the said provision. The alleged contemnor is to be informed as what is the charge, he has to meet. Thus, specific charge has to be framed in precision. The alleged contemnor may ask the Court to permit him to cross-examine the witnesses. The case should not rest only on surmises and conjectures. There must be clear and reliable evidence to substantiate the allegations against the alleged contemnor. The proceedings must be concluded giving strict adherence to the statutory Rules framed for the purpose.

B) Contempt of Courts Act are quasi-criminal in nature and orders passed in those proceedings are to be treated as orders passed in criminal cases - burden and standard of proof in contempt proceedings, being quasi-criminal in nature, is the standard of proof required in criminal proceedings, for the reason that contempt proceedings are quasi-criminal in nature.

In the case of quasi-criminal in nature, charges have to be proved beyond reasonable doubt and



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In the case of quasi- criminal in nature, charges have to be proved beyond reasonable doubt and alleged contemnor becomes entitled to the benefit of doubt. It would be very hazardous to impose sentence in contempt proceedings on some probabilities.

The Court should not punish an alleged contemnor without any foundation merely on conjectures and surmises in criminal contempt. What, however, applies to a proceeding of contempt of court are the principles of natural justice and those principles apply to the contempt proceeding with greater rigour than any other proceeding. This means that the court must follow a procedure that is fair and objective; that should cause no prejudice to the person facing the charge of contempt of court and that should allow him/her the fullest opportunity to defend himself/herself." (Emphasis added)

Also relied on Hon'ble Supreme Court judgment in **Ashok Kumar Agrawal's case (2014) 3 SCC 602**, where in para 18 & 19 it has been ruled as under:

" This Court in **Sahdeo alias Sahdeo Singh v. State of Uttar Pradesh and Ors.** MANU/SC/0132/2010 : (2010) 3



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SCC 705, after placing reliance on a large number of earlier judgments of this Court, held that proceedings of contempt are quasi criminal in nature and the burden and standard of proof required is the same as in criminal cases. Charges have to be proved beyond reasonable doubt and alleged contemnor becomes entitled to the benefit of doubt as it would be very hazardous to impose sentence in contempt proceedings on some probabilities.

In **Dr. L.P. Misra v. State of U.P.** MANU/SC/0546/1998 : AIR 1998 SC 3337; **Three Cheers Entertainment Pvt. Ltd. and Ors. v. C.E.S.C. Ltd.** MANU/SC/8152/2008 : AIR 2009 SC 735; and **R.S. Sujatha v. State of Karnataka and Ors.** MANU/SC/1012/2010 : (2011) 5 SCC 689, this Court held **that the power under Article 215 of the Constitution can be exercised only in accordance with the procedure prescribed by law.**

In view of the above, the High Court was required to examine as to whether the proper procedure has been adopted in bringing the petition under Article 215 of the Constitution and as to whether the limitation as prescribed under Section 20 of the Act 1971 was attracted in the case. **The High Court did not advert to any of such issue of paramount importance. More so, no reasoning has been given to reach a conclusion that no deliberate**



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attempt was made by the Respondents to cause any prejudice to the Appellant.

Thus, we are of the considered opinion that as both the parties had raised issues on facts as well as on law, the High Court ought to have dealt with the case adverting to all relevant issues, particularly when the Appellant had made an allegation that his liberty had been jeopardised by the Respondents by interfering with the course of justice by misleading the court. “

12. That in the similar case Constitution Bench of Hon'ble Supreme Court had ruled that when the allegations against Judge are based on the truth then it does not come under the purview of the Contempt.
13. in the case between **Subramanyam Swamy Vs. Arun Shourie AIR 2014 SC 3020** (Constitution Bench) ruled as under;

CASE NOTE : Contempt of court - Articles 129 and 215 of the Constitution - Scandalous statement published in Newspaper against Justice Kuldeep Singh, sitting Judge of the Supreme Court for his conclusion against the direct evidence available by inventing theories to discard the



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explanation given by the witness to help the party- It was further mentioned in the news article that if there had been any sense of honour or shame, a Judge would never have done any of this. If there were any residual sense of honour or shame, the Judge having done any of it and having been found doing it, would have vacated his seat. - But he will continue to do so from the Supreme Court of India itself. Such is our condition. And so helpless are we that there is nothing we can do about such a "Judge" -

Held,- The revelation of truth and the making of a fair criticism based on fact do not amount to a contempt of court though the truth revealed or the criticism made is such as to deprive the Court or Judge of public confidence.

14. Hence, it is necessary that and the principle of natural Justice demands that, the following witnesses be called for their cross-examination at the hands of Respondent no. 10.



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Witnesses to be called:

1. Shri. Justice S. J Kathawalla
 2. Shri. N. A. Patekar, Talathi
 3. Shri. Aspi. Chinoy, Sr. Advocate
 4. Shri. Ravi Kadam, Sr. Advocate
 5. Shri. Vishal Kanade, Advocate
 6. Shri. G. Rashmikant, Advocate
 7. Miss. Nikita Mishra, Advocate
 8. Mr. Aditya Mehta
 9. Ms. Shweta Jaydev,
 10. M/s. Federal & Rashmikant, Advocates, Solicitors
and Notary
 11. Shri. Nitin Thakkar , Vice President, BBA
 12. Shri. Viresh Purwant, Honorary Secretary AAWI.
15. The Petitioner No.1 is claiming himself to be Vice President of Bombay Bar Association and claiming to be authorized by the Bombay Bar Association. However No resolution and authorization is filed alongwith the petition. Which itself is against the law laid down by Hon'ble Supreme Court in A.C. Narayan's case **AIR 2015 SC 1198.**

And in the case of State Bank of Travancore Vs. Kingstone Computers **(2011) 11 SC 520.**



The same illegality is committed by Petitioner No. 2 Mr. Viresh Purwant of AAWI.

16. Therefore, it is necessary that they should be directed to produce the copy of said resolution. The copy of said resolution is necessary because it will prove that the Advocates appearing for the Petitioners are themselves signatory the resolution and thereby being de facto petitioner can not appear for the petitioner in dual capacity as ruled by this Hon'ble Court.

In view of the provisions of Advocates Act, Bar Council of India Rules and more particularly law laid down in **2009 (3) CTC 6** and **AIR 2014 MAD 133**, the Counsels who are members of the unincorporated petitioner association and who authorized the Petitioners to file the present petition cannot act in dual capacity of one as a Lawyer and one as a petitioner but they acted against the law and they acted as petitioner and also as an advocate and therefore they are guilty of violation of law laid down by this Hon'ble High Court in Court on its own Motion Vs. N.B. Deshmukh **2011 ALL MR (Cri) 381 (Bom) (DB)** and therefore they should not been allowed to argue the case.

In **AIR 2014 Mad 133**, it is ruled that



Advocates Act - the Advocate cannot appear or plead before a court of law

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in dual capacity, one as party and other as an Advocate - he , himself is either espousing his own cause in the proceedings cannot claim any privileges available to Advocates appearing for the litigants before the Court and cannot be permitted to appear in robes before the Court - Advocate is the agent of the party, his acts and statements, made within the limits of authority given to him, are the acts and statements of the principal, i.e., the party who engaged him – **Bombay High Court in the case of High Court on its own Motion vs. N. B. Deshmukh reported in 2011 (2) Mh. L. J., 273**, taken the above view.

17. Furthermore, it is not mentioned in the petition as to who supplied them the relevant information which even otherwise is false, misleading, twisted and dishonestly concealed and presented in a distorted manner before this Hon'ble Court.



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18. That it is nowhere mentioned in the petition that the abovesaid associations are registered or not and what legality they have and what are their by – Laws which is mandatory requirement.
19. That the present petition is filed by the petitioners, who are not the witnesses of the alleged incidences nor there is any authorization given by the affected party stating that the allegations and video recording of the said court proceeding dated 31.08.2016 as circulated and supported by Respondent No. 1 to 10 are not true or genuine.
20. Under these circumstances it is necessary that this Hon'ble Court may please to summon the witnesses mentioned above.
21. The applicant reserves his right to apply for Narco Analysis Test and brain mapping and other tests of witnesses if they depose falsely or dishonestly rather if they did not depose the exact truth.
22. The applicant reserves his right to summon more witnesses based on the outcome of the examination of the witnesses and file reply affidavit, if needed, after cross examination of the witnesses.



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PRAYERS :-

It is therefore humbly prayed THAT THIS Hon'ble Court may pleased to :

a) Issue witness summons to

1. Shri. Justice S. J Kathawalla
2. Shri. N. A. Patekar, Talathi
3. Shri. Aspi. Chinoy, Sr. Advocate
4. Shri. Ravi Kadam, Sr. Advocate
5. Shri. Vishal Kanade, Advocate
6. Shri. G. Rashmikant, Advocate
7. Miss. Nikita Mishra, Advocate
8. Mr. Aditya Mehta
9. Ms. Shweta Jaydev,
10. M/s. Federal & Rashmikant, Advocates, Solicitors and Notary
11. Shri. Nitin Thakkar , Vice President, BBA
12. Shri. Viresh Purwant, Honorary Secretary AAWI.

In the interest of justice, equity and good conscience.

- b) Direct petitioners to produce their By - laws and resolution authorizing the petitioners to file the present petition.

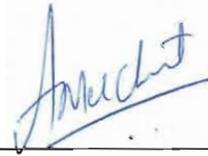


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- c) Direct Registrar of High Court to produce the details of the enquiry report as done under **‘In house procedure 1999’** on the complaints given by Respondent No. 1 and 10 against Shri. Justice S. J. Kathawalla, Shri. Justice V. M. Kanade and Shri. Justice A.K. Menon as has been referred by the petitioners in the present petition.
- d) Direct registry to make arrangements for video recording and live telecast of the present proceedings in the interest of justice.
- e) Direct registry to make arrangements for a big display and proper sound mechanism for display of the CD filed by the Petitioners as the transcript filed by the Petitioner is distorted version of the true facts.

**AND FOR THIS ACT OF JUSTICE THE APPLICANT SHALL
EVER REMAIN GREATFUL**

Hence, this Application.



Signature of applicant

Mumbai :
Date: 01/04/2017



VERIFICATION

I, **Ashiq A. Merchant**, age 44 years, the Applicant abovenamed, having address at Flat No. 504, Hicon's Residency, 26th Road, Bandra (W), Mumbai - 400 050 do hereby solemnly declared that, what are stated in Paragraphs No. 1 to 21 of the Petition are true to my knowledge and I believe it to be true and correct.

Solemnly affirmed at Bombay)

This 1st day of April, 2017)

Before Me

Advocate for Applicant

Applicant

BEFORE ME

01/04/2017

S. K. SHETTY B.A.,LL.M.
ADVOCATE
NOTARY GOVT. OF INDIA
8, "Prakash", Bestant Street,
Santacruz (W), Mumbai -400 054

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