

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 1291 OF 2017

Shailendra Madan Malara
Age 39 years, Occu. Business,
R/o. Shriram Colony,
Near Sai Hospital, Samarth Nagar,
Aurangabad.

....Petitioner.

Versus

1. M.D. Shirodkar,
Age 73 years, Occu. Business,
Partner of M/s. Kulkar Corporation,
4, Gazi Industrial Shed,
Hareram Industrial Estate,
I.V. Patel Road, Cross Lane,
Goregaon (East),
Mumbai.
2. The State of Maharashtra,
Through Police Inspector,
Kranti Chowk Police Station,
Aurangabad.

....Respondents.

Mr. Satyajit S. Bora, Advocate for petitioner.

Mr. K.C. Sant, Advocate for respondent No. 1.

Mr. S.J. Salgare, APP for respondent No. 2/State.

**CORAM : T.V. NALAWADE, J.
DATED : July 20, 2018.**

JUDGMENT :

- 1) Rule. Rule made returnable forthwith. By consent, heard both the sides for final disposal.

2) The present proceeding is filed under section 482 of Criminal Procedure Code and under Articles 226 and 227 of the Constitution of India to challenge the decision of learned Additional Sessions Judge, Aurangabad in Criminal Revision No. 185/2015. The Sessions Court has allowed the revision and the order of issue process made by the learned Judicial Magistrate, First Class, Aurangabad in R.C.C. No. 1316/2014 for the offence punishable under section 420 r/w. 34 of Indian Penal Code is set aside.

3) R.C.C. No. 1316/2014 was filed by the present petitioner as a private complaint against present respondent No. 1 and the company, which respondent No. 1 was controlling and also one concern of the respondent. It is allegation of the petitioner that by making false representation to him about 'Pack to Pack Offset Printing Machine' he was made to purchase of printing machine by the respondent No. 1 for consideration of Rs.4.5 lakh. It is the contention of the complainant that as per the technical specification, machine was expected to give output of 15,000 copies per hour. It is contended that when he put machine in operation, he found that the output was only 500 copies per hour. It is his contention that there were other defects in machine as the ink was spreading over the paper and paper was getting torn during printing process. It is the contention of the complainant that he informed accused about the

defects and deficiencies and requested to replace the machine, but accused did not pay any heed to the request.

4) The complainant had approached District Consumer Forum and District Consumer Forum had given direction to the accused to return the amount of Rs. 4.5 lakh, the price of the machine. This order was challenged before State Forum by the accused. The appeal came to be allowed in the year 2013 as the State Forum held that it was a commercial purpose for which the machine was purchased by the complainant. Thus, the decision to return the money given by the District Consumer Forum was set aside by the appellate forum and that decision has become final. After the decision of District Forum, the accused had taken back the machine by making representation that the defects will be rectified. It is the contention of the complainant that after decision of the appellate forum, the accused has not returned the machine also and he has not returned money as he succeeded in the appeal. It is the contention of the complainant that by making false representation, the machine was sold to him and so, the offence of cheating is committed. It is also contention that by making false representation machine was taken back and it is not returned and so, by that act also offence is committed.

5) The learned J.M.F.C. recorded verification under section 200 of Cr.P.C. and the order of process issue is made. The learned Judge of the Sessions Court has allowed the revision by holding that the dispute is of civil nature. The learned counsel for the accused supported the decision of the Sessions Court and he placed reliance on some observations made by the Apex Court in the cases reported as **AIR 2009 SC (Supp) 59 [V.Y. Jose and Anr. Vs. State of Gujarat and Anr.]**, **AIR 2015 SC (Supp) 2402 [International Advance Research Centre for Powder Metallurgy and New Materials (ARCI) and Ors. Vs. Nimra Cerglass TEchnics (P) Ltd. and Anr.]** and **AIR 2016 (SC) 2679 [Rini Johar and Anr. (Dr.) Vs. State of Madhya Pradesh and Ors.]**. This Court has carefully gone through the observations made by the Apex Court in aforesaid cases and particularly, through the facts of the reported cases. The facts of the reported cases were altogether different.

6) In the present matter, copy of technical specification was made available showing that printing speed was given as 15,000 copies per hour continuous and 1,00,000 Forms per shift. The submissions made show that a Commissioner was appointed by District Forum to ascertain the speed of machine and Commissioner after testing the performance, gave report that the machine was not giving performance as per the specifications and there was force in

the contentions made by the complainant before the District Forum. It is also not disputed that after decision of District Forum, the accused had taken the machine to his factory for rectification, but the things changed for him when he got the decision of appellate forum in his favour.

7) The contention that the dispute is of purely civil nature in the case like present one, cannot be accepted as the machine ordered was manufactured by the accused in routine course. The machine was not prepared as per the specifications of the complainant and the complainant had not requested for adaption or change in the machine for increasing of output. Thus, there was the representation that the machine will print 15,000 Forms per hour continuous and 1,00,000 Forms per shift and this representation was false. Only on the basis of this representation, the machine was purchased by the complainant. It is true that only when the complainant lost in State Forum in the year 2013, the complainant went to Magistrate and filed the complaint, but that does not mean that he was treating the dispute as dispute of civil nature. The complainant had right to prosecute both the proceedings. In view of the punishment provided for the offence and as the matter was decided by the State Forum in the year 2013, it cannot be said that the delay was caused in giving complaint and this delay will come in

the way of complainant in getting the decision from Criminal Court. Further, one more promise was given by the accused to rectify the things and machine was taken back. Thus, the machine is also with accused and offence of misappropriation can also be made out.

8) The learned counsel for accused argued one more circumstance. He submitted that all the accused persons mentioned in the complaint are residents of Mumbai and other place and they were not residing within local jurisdiction of J.M.F.C., Aurangabad and in view of this circumstance, it was necessary for the J.M.F.C. to follow the mandatory procedure given in section 202 of Cr.P.C. There is force in this submission made for the accused. The record does not show that order of inquiry was made under section 202 of Cr.P.C. by the learned J.M.F.C. Only on the basis of verification which was apparently recorded under section 200 of Cr.P.C. the order of issue process was made. However, the other matter which is mentioned above can be found in the complaint. It will be open to the complainant to produce other record also after restoring of the matter if the Magistrate starts inquiry under section 202 of Cr.P.C. For making such inquiry, the matter needs to be restored. On that ground, the complaint cannot be dismissed. It can be said that it was fault of Magistrate for which the complainant cannot be blamed and complainant cannot be made to suffer. In the result, following

order :

ORDER

(I) The petition is partly allowed.

(II) The decision of learned Additional Sessions Judge, Aurangabad in Cri. Revision No. 185/2015 is hereby partly modified as under :-

(A) Revision is allowed. The order of issue process made in R.C.C. No. 1316/2014 by J.M.F.C. Aurangabad is hereby set aside. The matter is restored to the file of J.M.F.C., Aurangabad for fresh consideration. The J.M.F.C. is expected to follow the procedure given in section 202 of Cr.P.C. and after that do the needful.

Rule is made absolute in aforesaid terms.

[T.V. NALAWADE, J.]

ssc/