

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

**CRIMINAL WRIT PETITION NO.238 OF 2016**

M/s.ED Process Technologies Pvt.Ltd. .. Petitioner  
**Vs.**  
Manoj Panwar & Ors. .. Respondents

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Mr.Abhijeet Desai a/w. Vrushali L. Maindad, Advocate for the  
Petitioner.  
Mr.Y.M. Nakhwa,APP for the Respondent – State.

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**CORAM : PRAKASH D. NAIK, J.**

**DATED : AUGUST 10, 2018.**

**P.C. :**

Heard both sides. The petitioner is the original complainant. The complaint bearing no.122 of 2012, was filed before the Court of Judicial Magistrate First Class Thane, alleging offences punishable under Sections 120, 403, 405, 406, 417, 418, 420, 426, 427 read with 34 of Indian Penal Code (“IPC” for short).

2 Brief facts of the complaint are as under:

(a) The complainant company is the associate/sister concern of M/s.Pyramid E & C Group. The complainant is in business of offering engineering supply and construction of

Bio-ethanol plants on turn key basis.

- (b) Director of Pyramid E & C Group Mr.Ashish Bajpai was induced by the accused No.1, by various representations of a profitable business to enter into "Joint Venture Agreement". Accused no.1 had represented that, he would obtain and execute the orders and further ensure that, the risk, exposure and expenditure of complainant would be minimax as accused no.1 would ensure orders against credit and use his expertise by contacting his known vendors to supply items and services at lower cost.
- (c) The customers from whom, the orders were procured by the accused no.1, in the name of complainant Company, started defaulting on their payment obligations and despite protests by the other Director Mr.Ashish Bajpai, the accused No.1, continued the supply of materials and services to the defaulters.
- (d) Accused No.1 has not informed the company and the Board of Directors about the development but also continued the work and supplied without seeking any approval or even

informing the other Director.

- (e) The accused no.1 suddenly and without any reason abandoned the work. Accused no.1 had not visited the site for several months and accused no.2 appointed by accused no.1 had engaged sub standard construction contractors and they could not account for the materials at site.
- (f) Thus, accused no.1 had intended right from the inception to mislead, cheat and cause losses to the Pyramid E & C Group, by deliberate acts of omission. The money which ought to have been transferred to the account of the company was transferred to the personal bank account of accused no.2 in order to make payments to Site Contractors. The cost was escalated to more than project cost. Thus, accused no.1 with his malafide intention started new company in the name and style as "M/s.Vapco Engineers Pvt. Ltd.", which does the same business as complainant company. Existing customers and monies due from existing contracts of complainant were diverted to M/s.Vapco and bribes are recovered from suppliers of complainant.

- (g) The accused colluded with customers M/s.Bhutan Centennial Distilleries to encash Bank Guarantee of Rs.2,20,00,000/-, given by the company and transfer the contract to new company. Vast amounts were paid as unsecured advances authorised by accused no.1, to most of complainants vendors and in some cases even the advance Bank Guarantee was returned to vendor prior to obtaining the delivery of goods or the performance Bank Guarantee worth Rs.2,51,150/-, against orders placed in excess of Rs.16 crores.
- (h) Respondent No.1, appointed respondent No.2 for supervising the construction work at project sites. The respondent no.2 engaged in misappropriating the amount to his personal account. This misappropriation was done in collusion with Mr.U.K. Sharma of M/s.Mantra Resources who was instrumental in siphoning money.

3            Learned Magistrate recorded the verification statement of complainant. By order dated 27<sup>th</sup> April, 2012, the Court directed the concerned police station to conduct an inquiry

under Section 202 of Cr.P.C. In pursuant to the said order, inquiry was conducted and the report dated 28<sup>th</sup> November, 2012 was submitted to the Court. In pursuant to that the order dated 26<sup>th</sup> February, 2013, process was issued against the accused for the offence under Section 406 read with 34 of IPC.

4           The order issuing process passed by the trial Court was challenged by respondent nos.1 and 2 by preferring criminal Revision Application No.250 of 2013. Learned Sessions Judge by order dated 27<sup>th</sup> November, 2015, set aside the order of process. Hence, the petitioners have invoked Article 227 of the Constitution of India as well as the inherent powers of this Court under Section 482 of Cr.P.C. challenging the order passed by the Sessions Court. During the pendency of this petition, the petitioner sought amendment of the petition and, thereafter, additional grounds and prayers were made in the petition.

5       Learned counsel for the petitioner submitted that on the basis of the averments in the complaint, verification statement and the report tendered by police, after conducting an inquiry under Section 202 of Cr.P.C., offences under Sections 120, 403, 405, 406, 417, 418, 420, 424, 425 read with 34 of IPC were made

out. However, learned Magistrate had issued process only against Section 406 of IPC. It is further submitted that the Sessions Court had committed an error in passing the impugned order setting aside the process under Section 406 of IPC. It is further submitted that the learned Magistrate has also committed a error in not assigning any reasons for not issuing process for other offences. Learned Magistrate has also overlooked the Report tendered by the police after conducting inquiry under Section 202 of Cr.P.C. It is submitted that the order passed by the learned Magistrate without assigning reasons for not taking cognizance of the complaint in relation to the other offences amounts to rejection of the petitioner's complaint for the said offences without giving any reasons. It is submitted that the averments in the complaint clearly makes out the offence of criminal conspiracy, cheating and other offences, and, thus, the Court ought to have issued the process for the said offences. It is further submitted that the learned Sessions Judge had passed a cryptic order while setting aside the order dated 26<sup>th</sup> February, 2013. Learned Sessions Judge has not taken into consideration the contents of the complaint, the report of police and the documents which were relied upon by the complainant which *prima facie* makes out the offences against the respondents. It is

further submitted that respondent no.1 continued to remain as a Director of Petitioner Company. His role, as a Director of the Petitioner Company did not cease till date. Respondent no.1 in collusion with respondent no.2 had formed another company M/s.Vapco Engineers Pvt. Ltd. Having conflict in so far as the business of the petitioner company is concerned without confirmation or taking into consideration the Directors of the petitioner company. By such act in forming a rival company, huge monetary loss as well as goodwill and reputation has been caused to the petitioner company at the instance of respondent no.1. It is submitted that the said aspect has not been considered by the Courts below. The Sessions Court had not assigned any cogent reason for setting aside the order of process under Section 406 of IPC. It is submitted that although the petitioner had not challenged the order of the learned Magistrate for not taking cognizance in respect to the other offences before the Sessions Court, the petitioner by invoking the inherent powers of this Court seeks to challenge the said order before this Court. It is, therefore, prayed that the order passed by the Sessions Court as well as the trial Court be set aside and the matter be remanded back to the trial Court for fresh consideration.

6 I have gone through the complaint, impugned order, and, the other documents which are annexed to this petition. I have also perused the report filed by the police in pursuant to inquiry under Section 202 of Cr.P.C. The petitioner/complainant, had made requisite averments in the complaint as well as the verification statement. Learned Magistrate, however, issued process under Section 406 read with 34 of IPC. It is pertinent to note that the reports submitted by the police indicated that the offence under Sections 406, 418, 420, 34 of IPC are made out. On perusal of the report, it is apparent that the detailed inquiry was conducted by the police. Statements of various persons were recorded and after analyzing the material on record, report was submitted before the Court stating that there is misappropriation of the account and the accused have committed aforesaid offences. The trial Court, while passing the order of process has not given any reason for not issuing process for the other offences. In the light of the fact that the report was positive, it was expected that the trial Court would assign the reason for discarding other offences. It is further noted that the learned Sessions Judge while passing impugned order dated 27<sup>th</sup> November, 2015, has observed that the complaint does not reveal that some amount was entrusted to the accused and they

disbursed dishonestly for their own use in violation of dictates of the Company. It is further observed that the main crux of the offence is entrustment of money or domination over the property handed over. This main ingredient is not seen in the allegation made in the complaint and statement given in investigation under Section 202 of Cr.P.C. In the report under Section 202 Cr.P.C., it is stated that there is truth in the complaint. The accused cheated the complainant, misappropriated the amount belonging to complainant and thereby the offences under Sections 406, 418, 420, 34 are made out. From the order it is apparent that the learned Sessions Judge has overlooked the report under Section 202 Cr.P.C. The order of process is silent as to why the Court was not inclined to issue process under Sections 120, 420, 403, 417, 418, 426, 427 read with 34 of IPC. The petitioner had not challenged the order issuing process only for an offence under Section 406 IPC. By amending the petition, it is contended that, the order of Sessions Court be set aside and order passed by trial Court dated 26<sup>th</sup> February, 2013, so far it relates to process issued under Section 406 read with 34 IPC be restored. It is also prayed that, order of trial Court in so far as it relates to non issuance of process under Sections 120, 420, 403, 417, 418, 426, 427 IPC be set aside and matter be remanded back to trial Court

to consider entire complaint a fresh for purpose of issuing process under Section 120, 403, 417, 418, 426, 427 IPC. Once it is depicted that there is non application of mind by trial Court, the matter is required to be remanded to said Court in entirety. The reason assigned by Sessions Court are also not satisfactory which also reflects non application of mind. Although the Sessions Court has referred to report under Section 202 of Cr.P.C. which indicates misappropriation, no cogent reasons are assigned to discard the report. It is not necessary to make further observations on the merits of the case considering the facts that the order passed by the learned is set aside by remanding the matter back to the trial Court for fresh consideration.

7           In the circumstances, the order passed by the Sessions Court as well as the order dated 26<sup>th</sup> February, 2013, passed by the learned Magistrate are required to be set aside. Hence, I pass the following order:

**:: ORDER ::**

- (i) Criminal Writ Petition No.238 of 2016, is allowed;

- (ii) The order passed by the Sessions Court dated 27<sup>th</sup> November, 2015 in Criminal Revision Application NO.250 of 2013 as well as the order dated 26<sup>th</sup> February, 2013, passed by the learned Judicial Magistrate First Class, are set aside;
- (iii) The matter is remanded back to the trial Court for fresh consideration;
- (iv) In consonance with observation made in this order, the learned Magistrate shall deal with the complaint in accordance with law;
- (v) Writ Petition No.238 of 2016, stands disposed of;
- (vi) Parties to appear before the trial Court on 27<sup>th</sup> August, 2018 at 11:00 a.m.

**(PRAKASH D. NAIK, J.)**