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

WRIT PETITION NO.4181 OF 2016

Shailesh Jayantilal Shah	...Petitioner
Versus	
State of Maharashtra and Anr.	...Respondents

Mr.C.L.Pendse i/b Mr.S.P.Narkar, for the Petitioner.

Mr.Yogesh Dabke, A.P.P for the Respondent No.1-State.

Mr.S.R.Dubey, for the Respondent No.2.

CORAM : REVATI MOHITE DERE, J.

DATE : 22nd JANUARY, 2018

P.C. :

1. Heard learned counsel for the parties.

2. By this petition, the petitioner has impugned the order dated 8th November, 2016, passed by the learned Additional Sessions Judge, Greater Mumbai, in Criminal Revision Application No.531 of 2011, filed by the Respondent No.2-Complainant, by which the learned Judge was pleased to set-aside the order of the learned Magistrate discharging the

petitioner and the other accused under Section 239 of Code of Criminal Procedure.

3. Learned Counsel for the petitioner submits that no offence as alleged is disclosed, qua the petitioner. He submitted that the petitioner had only acted as an agent between the vendor and the buyer and that he had no knowledge that the percentage of waste material was more than mentioned in the contract. He submitted that the Revisional Court had erred in allowing the application preferred by the respondent no.2-complainant, by setting aside the order of the learned Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Mumbai, discharging the accused from the case under Section 239 Cr.PC.

4. Learned Counsel for the Respondent No.2-Complainant opposed the petition. He submitted that no interference was warranted in the impugned order. He further submitted that co-accused – Satyapriya D. Dash had also impugned the order dated 8th November, 2016, passed by the learned Additional Sessions Judge, Greater Mumbai, in Criminal Revision Application No.531 of 2011, in this Court and that this Court

(Coram:Smt.R.P.SondurBaldota, J.) vide order dated 8th March, 2017, passed in Criminal Writ Petition No.4340 of 2016, was pleased to dismiss the said petition. Learned Counsel for the Respondent No.2-Complainant submitted that the said order has been suppressed by the learned counsel for the petitioner. The same is opposed to by the learned counsel for the petitioner. He submitted that there is no suppression of the said order dated 8th March, 2017, as the role of the present petitioner is different from that of co-accused – Satyapriya D. Dash.

5. Perused the papers including the impugned order. At the outset, it may be noted, that though the petitioner has filed this application seeking his discharge from the case, except the complainant's statement, the entire charge-sheet was not filed by the petitioner and it is only when the same was pointed out, that the learned counsel tendered a copy of the charge-sheet during the course of arguments. Similarly, the order passed in Criminal Writ Petition No.4340 of 2016 (filed by co-accused – Satyapriya D. Dash) was not placed on record by the learned counsel for the petitioner, though Mr.Pendse himself had appeared in that petition and was aware of the same. Even today, the learned counsel Mr.Pendse does not have a copy

of the said order dated 8th March, 2017, passed in Criminal Writ Petition No.4340 of 2016. According to Mr.Pendse, since the order was tendered by the respondent no.2, it was not necessary for him to carry the said order and produce the same.

6. Be that as it may, coming to the facts of the present case, it may be noted that the Respondent No.2 (original complainant) had filed a complaint as against the petitioner (original accused no.3) and others, which was registered vide C.R.No.37 of 2005 with the GB CID, Unit III, Mumbai, for the alleged offences punishable under Sections 420, 120B r/w 34 of the Indian Penal Code. After investigation charge-sheet was filed as against the petitioner and two others and the case was numbered as C.C.No.482/PW/2007. The petitioner and 2 others filed an application seeking discharge from the said case. The learned Magistrate after hearing the parties was pleased to discharge the petitioner as well as the two other accused from the said case vide order dated 15th February, 2011. Being aggrieved by the said order dated 15th February, 2011, by which the learned Magistrate was pleased to discharge the petitioner and two others, the respondent no.2 (original complainant) herein, filed a Revision

Application before the Sessions Court and sought quashing and setting aside of the order of discharge. The Additional Sessions Judge, Greater Mumbai, vide order dated 8th November, 2016 was pleased to quash and set aside the order dated 15th February, 2011 passed by the learned Magistrate, discharging the petitioner and two others. Hence, this petition.

7. At the outset, it may be noted that co-accused – Satyapriya D. Dash had challenged the very same order of the Sessions Court dated 8th November, 2016, in this Court and this Court (Coram:Smt.R.P.SondurBaldota, J.) vide order dated 8th March, 2017, passed in Criminal Writ Petition No.4340 of 2016 (preferred by co-accused – Satyapriya D. Dash) was pleased to dismiss the said petition on merits. Paragraph 2 of the said order reads thus:-

“2. The Sessions Court in the impugned order, after going through the entire record has noted that though there is no document to show that the petitioner had made any direct representation to the complainant as regards the contents of wastage in the scrap sold, the sale/ purchase agreement dtd. 19th April, 2004 is signed by him for S.M. International INC. The

contract mentioned that the wire scrap bundle had 3 to 5% rubber attachments and foreign particles. When the complainant got the sample checked for the contents for the wastage, it was found that the metal scrap contained in, it was only 68.93% and the wastage was to the extent of 31.07%. The container was loaded and sent to the Port even before the sale contract was sent for execution. This would mean that the petitioner had knowledge that the material had 31.07% wastage while the contract stated that it would contain only 3 to 5 % wastage. This was the false statement made since at the beginning of the transaction. This would speak about the intention to cheat. This material according to the Sessions Court is prima facie sufficient to proceed against him and it was not the case for discharge. In my opinion, the above observations of the Sessions Court drawn from the material on record are correct and need no interference from this Court. Hence, the petition is dismissed.”

8. A perusal of the statement of respondent no.2 (original complainant) shows the nature of transaction entered into between him and the accused. The complainant has in detail stated how he met the petitioner, about the transaction etc. He has specifically stated that he was dealing with the petitioner alongwith others on behalf of M/s.S.M.V International. As noted earlier, the charge-sheet was not filed alongwith the

petition and hence a copy of the charge-sheet was tendered by the learned counsel for the petitioner, during the course of the arguments, on being asked. The said charge-sheet is taken on record. A perusal of the statements of Shri Kirit Dalal and Umesh Shah also discloses the role of the petitioner. The essential allegations, qua the petitioner and others is that the percentage of waste material (3 to 5%) were stipulated in the contract and despite the same, the wastage found was more than 30%. It appears that the petitioner was dealing directly with the complainant, pursuant to which, the parties entered into an Agreement dated 19th April, 2004 i.e. on a representation made by the petitioner. The contract mentions that as far as Rubber and other wastage is concerned, it would not be beyond 3% to 5%, however, when, the complainant got the sample examined, report showed that the sample contained 68.93% metal and 31.07% rubber and dust, which was contrary to the terms of the Contract. It is evident that a false statement was made right from the inception of the transaction, which *prima facie* shows the intention of the petitioner to cheat the complainant. *Prima facie*, the statements of the complainant and the statements of Kirit Dalal and Umesh Shah, clearly shows the complicity and the role of the petitioner. The impugned order is neither perverse nor unsustainable,

warranting interference in writ jurisdiction.

9. Accordingly, the petition is dismissed and disposed of as such. However, the trial is expedited.

10. It is made clear, that the observations made herein, are *prima facie*, for the purpose of deciding this petition and the learned Judge shall decide the case on its own merits, uninfluenced by the observations made in this order.

REVATI MOHITE DERE, J.