

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

CRIMINAL APPLICATION NO. 717 OF 2021

M/s. Loyalty HR Benefits Pvt. Ltd.

...Applicant

Versus

The State of Maharashtra and Others

...Respondents

....

Mr. Sanjiv Sawant with Mr. Rohan Mahadik, Ms. Shailja Patel i/by
The Juris Partners for Applicant.

Mr. Amit Ghag i/by Mr. Vishal Maheshwari, Advocate for
Respondent Nos. 2 to 11.

Mr. A. D. Khamkhedkar, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 16th JUNE 2022

PC :

1. The Applicant is the original complainant in C.C. No. 58/SW/2015 filed in the Court of learned Metropolitan Magistrate 61st Court at Kurla, Mumbai for offences punishable under Sections 406, 409, 420 of Indian Penal Code and Section 63 (b) of the Copy Rights Act, 1957 and Sections 16, 51, 107 read with 96 of Copy Rights, Design and Patents Act, 1988.

2. The summary of the allegations in the complaint is that, the complainant is in the field of marketing and developed Swipe Card

similar to credit card. This card was to be used by customer. There are various companies and traders to give it to their customers and employees for promoting business and customers and employees would be benefited by various discounts and schemes. The complainant approached accused No.1 and after deliberation, the accused agreed to make software to support the card and to set up the terminals. The complainant paid the amount of Rs.14,85,900/- obtained from loan through State Bank of India credit guarantee fund trust for small and medium enterprises schemes established by Government of India and SIDBI. The software was registered under the intellectual property Act. Accused though agreed to deliver web base PC applications but denied it to give and supplied defective EDC terminals causing loss to the complainant. The accused deleted the software from their system and started using it for their own. The Act of accused was infringement of copy right. The accused demanded more money. Complaint was filed with the Police. No action was initiated by police. The applicant then preferred Writ Petition before this Court which was withdrawn on 3rd September 2014 with liberty to file complaint before appropriate Court.

3. Learned Metropolitan Magistrate directed investigation under Section 156(3) of Cr.PC. vide order dated 8th April 2015.

4. Pursuant to directions under Section 156(3) of Cr.P.C. MECR No.131 of 2015 was registered with Antop Hill Police Station, Mumbai on 25th April 2015 for offences under Sections 406, 409, 420 of Indian Penal Code. Section 63, 63(b) of Copyright Act read with Sections 16 and 51, 107 read with 96 of Copy Rights Designs and Patent Act, 1988 and Sections 27, 28, 29, 30, 31 and 117 of Trademark Act.

5. Investigation was conducted by Police and report dated 18th November 2015 was submitted to the Court of learned Metropolitan Magistrate stating that, no offence is made out. The report was challenged by applicant/complainant by filing Protest Petition. The learned Metropolitan Magistrate vide order dated 26th April 2016 directed Senior Inspector of Police, Antop Hill Police Station to conduct further investigation and submit report. Pursuant to said order further investigation was conducted. Supplementary statement of the complainant was recorded. The police submitted second report dated 6th January 2017 opining that, the dispute is of civil nature. The complainant filed Protest Petition challenging the report. The learned Metropolitan Magistrate vide order dated 1st February 2018 dismissed the complaint. The Protest Petition was rejected and the final report filed by Investigating Officer was accepted.

6. The applicant/complainant challenged the order dismissing the complaint by preferring Criminal Revision Application No.370 of 2018. By order dated 28th February 2020, the said Revision Application was rejected.

7. The Applicant/complainant is aggrieved by aforesaid adverse orders and has preferred this application under Section 482 of Cr.P.C. challenging the said orders.

8. Learned Advocate for the applicant submitted that, the order dismissing the complaint, rejecting Protest Petition and order passed by revisional Court are contrary to law. The offences alleged in the complaint were clearly made out against the accused. The Court was required to adopt *prima facie* view at this stage. The accused were required to be tried for the said offences. Merely because, there are facets of civil dispute, the complaint cannot be dismissed. Penal offences were made out. The contents of complaint, statement of complainant and investigation conducted by the police supports the contention of the complainant and the offences under the IPC and copyright Act were clearly made out. The police had ignored vital documents and submitted report that, the dispute is of civil nature. The Sessions Court has mechanically rejected the revision Application. The Court below has not appreciated the principle laid down by the Apex Court in several decisions while passing the

impugned orders. The learned Magistrate was satisfied with the fact that the complaint is required to be investigated by police and directed investigation under Section 156(3) of Cr.PC. The Investigating Officer has misdirected himself in concluding that no offences are is made out or that the dispute is of civil nature. Learned Magistrate was not satisfied with the first report dated 18th November 2015 and directed further investigation vide order dated 26th April 2016. The Investigating Officer again carried out investigation and called upon bank officials as the applicant had obtained loan facility which was given to the accused for developing the software. The State Bank of India issued letter to the Senior Inspector of Police, Antop Hill Police Station stating that, the cash credit limit of Rs.3,00,000/- and term loan of Rs. 14.75 lakhs were sanctioned to the applicant in July 2009 by the Bank. The said account was turned into non-performing asset on 14th February 2011 and migrated to their Branch in March 2011 for further recovery of Bank's dues. The payment of Rs.14,85,900/- was made in favour of vendor M/s. AGS Infotech Pvt. Ltd. on 31st March 2010 for supply of software at the request of applicant by SME City Credit Centre, Mumbai. The said letter clearly shows that, the applicant availed loan facility and the payment was made to the accused for supply of software. During the course of investigation, statement which

supports the complaint was recorded by Police. The Commissioner of Police had directed to conclude investigation expeditiously. The statement of accused were also recorded. Contradictory versions were given by them. Investigating Officer again failed to carry out investigation and file second report. It was opined that, the dispute is of civil nature. Assuming that, the transactions has some features of civil transactions, it cannot be said that, the penal offences are not made out. There was clear violation of Copyright and Trademark Act. Wrongful loss was caused to the complainant due to false representation by the accused. There is no denial that amount was parted to the accused by the complainant. The order passed by Sessions Court is erroneous. The findings in the report submitted by Investigating Agency are irrelevant and without application of mind. The learned Magistrate has ignored the contents of Protest Petition.

9. Learned Advocate for Applicant relied upon following decisions:-

(i) *State of Odisha Vs. Pratima Mohanty Etc.* delivered by Supreme Court in Criminal Appeal Nos.1455-1456 of 2021 decided on 11th December 2021.

(ii) *Kamaladevi Agarwal Vs. State of West Bengal* delivered by Supreme Court in Criminal Appeal No. 1059 of 2001 decided on 17th

October 2001.

(iii) *Lalmuni Devi Vs. State of Bihar & Ors.* delivered by Supreme Court in Criminal Appeal No.1127 of 2000 decided on 15th December 2000.

10. Learned Advocate for Respondent Nos. 2 to 11 submitted that, there is no infirmity in the order passed by learned Magistrate and the learned Sessions Judge. The applicant has suppressed material facts in respect of EOW investigation and EOW report and defamation proceedings initiated by respondent against the applicant and apology submitted by the applicant before the High Court. The revisional powers under Section 397 of Cr.P.C. are discretionary. Only in the event, the glaring defect in the procedural aspect or there is manifest error on the point of law. The exercise of revisional jurisdiction ought to be called for. None of the offences are made out. The investigation was conducted twice. In both the reports, Investigating Agency did not find any material constituting the alleged offences. Considering the report submitted by Police, the learned Magistrate rejected the Protect Petition and dismissed the complaint. The complaint was filed with ulterior motive to harass the respondent Nos.2 to 11. The business venture of the applicant did not take off as expected due to which the applicant did not get response for his cards. In the month of January 2012 i.e. after a

period of one year from the last communication between applicant and respondent No.2, notice was served upon respondent No.2 calling upon to return amount of Rs.14,85,000/- being the amount paid for the services rendered by the Respondent No.2 for developing and hosting the application. Respondent No.2 by letter dated 17th February 2012 responded to this notice and denied the claim and called upon applicant to pay the sum of Rs.3,91,000/- which was towards the balance payment of set up fees and making cards. The applicant failed to pay the said amount. The applicant lodged the false complaint bearing No.162 of 2012 against Respondent No.2 and others with EOW Crime Branch. On the said complaint, the EOW conducted detailed investigation and on 23rd September 2013, the Senior Inspector of Police of the Crime Branch closed the investigation on the ground that, no case was made out against respondent No.2 and its directors and officer bearers. The applicant has not disclosed about the EOW investigation and said report before the Sessions Court and this Court. The applicant filed Criminal Writ Petition No. 204 of 2014 in this Court praying that EOW should be directed to register the offence against the respondent No.2 and others. The Writ Petition was withdrawn on 3rd September 2014. Thereafter, the applicant filed criminal complaint before the Magistrate. The Court directed investigation under Section 156(3)

of Cr.P.C. The report was submitted by concerned Police Station stating that no offence was made out against respondent No.2 and others. The learned Magistrate directed to further investigation. Second report submitted by police reiterating that no criminal offence was made out against the respondent No.2 and others. The learned Magistrate rejected the protest Petition and dismissed the complaint. Cogent reasons were assigned by learned magistrate while dismissing the complaint which is apparent from the observation in paragraph No.10, 13, 15, 16 and 18 of impugned order dated 1st February 2018 passed by learned Magistrate. The application is devoid of merits and hence, it may be rejected.

11. From the tenor of the complaint it appears that, there were certain contractual obligations between the parties. From the document on record it appears that the applicant/complainant had initially approached the EOW Crime Branch, Mumbai. Letter dated 3rd May 2013 issued by Senior Inspector of Police, Unit-3, EOW Crime Branch, Mumbai to the complainant indicate that preliminary enquiry No. 162 of 2012 which was registered at the Economic Offences Wing, Mumbai in connection with application dated 20th June 2012 has been closed. Apparently the police did not take cognizance of complaint. The applicant preferred Criminal Writ Petition No. 204 of 2014 which was allowed to be withdrawn by

order dated 3rd September 2014 with liberty to file complaint before appropriate Court. The applicant then filed private complaint before the Metropolitan Magistrate. Vide order dated 8th April 2015 directions were issued to the police to conduct investigation and submit report in accordance with Section 156(3) of Cr.P.C. MECR No. 131 of 2015 was registered with Antop Hill Police Station on 25th April 2015. After conducting investigation report dated 18th November 2015 was submitted before the learned Magistrate stating that no offence is made out. Protest Petition was filed by the complainant. Learned Magistrate directed further investigation by order dated 26th April 2016. Supplementary Statement of the complainant was recorded on 9th June 2016. On completing investigation second report was submitted by police on 6th January 2017 stating that dispute is of civil nature. Protest Petition was filed by complainant. The learned magistrate vide order dated 1st February 2018 rejected the Protest Petition and report of Investigating Officer was accepted. The complaint was dismissed. While dismissing the complaint vide order dated 1st February 2018 it was observed that, the complainant did not mention in complaint about written contract of meeting for demo of software in which he accepted the software. There were no terms and conditions decided between them whether web base PC application would be there or

EDC terminals would be set up. In fact two/three EDC terminals were set in Bhivandi. The complainant was aware about it. There was no business response as expected by complainant or accused. The accused demanded remaining payment as well as the amount for EDC terminals set up in Bhivandi. The complainant denied to pay it. Notice was issued by complainant to accused for payment. Till this notice of accused to complainant, the complainant did not object. The complainant himself approached accused. There were series of e-mail exchanged between them for the software. The complainant did not object to set up terminal in Bhivandi but this was not pleaded by complainant in complaint. The accused charged complainant for his services. The complainant accepted and made initial payment. It is immaterial how the accused paid an amount to complainant and whether it was borrowed as loan. As per the documents, the accused never gave any inducements to the complainant. The complainant has alleged that the software was registered as per the Copyright, Design and Patents Act. No such documents were produced by complainant. The swipe card was developed and it was registered under the Trademark Act for the complainant. There was no allegation against the accused for infringement of Trademark of swipe card. The software was not registered as a intellectual property of complainant. The accused is professional software

developer and developed the software for complainant. There was dispute between them as accused demanded the remaining amount. Nothing was entrusted by the complainant to accused. There is no prima facie evidence to show that the accused used the software for their own use. The Investigating Officer made proper investigation and filed his report. There were no exact terms decided between complainant and accused regarding set up of EDC Terminal or web base. But EDC Terminal were set up at Bhivandi. Accused never protested. There was no response from the market customers. At the most, there was civil dispute between the parties. There was no intention to cheat. There was no wrongful gain to the accused. There was no inducement to deliver property.

12. The revisional Court has rejected the application by assigning cogent reasons. The learned Sessions Judge has observed that investigation was carried out by police twice. As per direction of trial Court. At the most, there would be dispute between the parties which is of civil nature but does not attract criminal liability. The reasoning of trial Court is acceptable. The report of the investigating Officer revealed that the complainant along with Police team visited various clients of accused but their computer system did not reveal any use of complainant's smart card or relating developed software. Complainant of misappropriation is not found acceptable. There was

no breach of Patent Act and Trademarks Act.

13. It is apparent that the police machinery has investigated the complaint and reports were submitted before the Court of learned Magistrate. The learned Magistrate considered the Protest Petition and documents on record and rejected the Protest petition and dismissed the complaint. In the light of the factual aspects of this matter and documents on record, I do not find any illegality in the impugned orders. The report submitted by police and the reasons assigned by the Court while passing impugned orders are within the parameter of law. The dispute is indeed of civil nature. No offences has alleged by complainant are made out and no interference is warranted in the impugned orders. The law relating to quashing the proceedings is well settled. The decisions relied upon were delivered in facts of respective cases. Hence, I pass the following order:-

ORDER

Criminal Application No.717 of 2021 is rejected and disposed off.

(PRAKASH D. NAIK, J.)