

ORDER BELOW EXH. 378

01. Accused no. 6 filed the present application under section 239 of the Criminal Procedure Code (Hereinafter referred to as Cr.P.C. for the sake of brevity). He submitted that M.I.D.C. Kupwad police station registered the offence under sections 406, 420 read with 34 of the Indian Penal Code (IPC) against him and other accused. As per case of the prosecution during the period of 01.04.2000 to 31.03.2003 Krishna Valley Co-operative Bank, Branch- MIDC misappropriated funds of Rs. 4,11,01,598/-. As per charge sheet itself accused no.6 was working as Assistant Manager in said Bank for the period of 10.08.1998 to 30.11.2000. Allegations against accused no.6 is that he passed the cheques and challans of some of the customers in spite having no balance in their accounts. As well accused no.6 induced people to deposit money in said Bank.

02. It is further submitted by accused no.6 that earlier he had filed for discharging him vide Exh. 347 but same came to be rejected on 23.03.2018. However subsequently legal position has developed and same is substantive change in the circumstances hence he preferred the present application. According to accused no.6 he is falsely implicated in the present offence. There is no material on record to proceed against him. Offence occurred during 01.04.2004 to 31.03.2003 and report lodged on 23.03.2005. as such there is inordinate delay of two years in lodging FIR. Furthermore accused no.6 resigned from said Bank on 31.10.2000 and alleged incident of misappropriation of funds committed after his resignation. At the time of lodging FIR name of present accused was not involved and it is subsequently added on 11.04.2005 on the basis of statement of one Umesh Shivdra Halpanwar who was working in the said Bank. Statement of one Shila Vidyadhar Chougule who stated that Manager used to make entries at night and told them to prepare challans

as per last nights entries made by the Manager.

03. Accused next submitted that on perusal of statement it seems that Wagh, Jadhav and Mujawar were making entries at night got the challans done next day from their junior employees. During investigation IO took specimen signature of present accused and sent it to Handwriting Expert, Pune for matching with the documents seized from the Bank on 11.07.2005. its report received on 28.09.2007 which shows that No opinion can be expressed. As such it proves that present accused nothing to do with the present offence.

04. It is next contention of present accused that an enquiry under Section 88 of the Maharashtra Co-operative Societies Act is conducted. Its report is filed at page no.148 which clearly shows that, during the enquiry no any material came on record to held liable the present accused and so the present accused was not held liable for the alleged misappropriation of the funds of the said Bank.

05. Defense counsel relied on following judgments,

- a. *Judgment of Hon. High Court in Bhaskar Shamrao Bhosle Vs The State of Maharashtra reported in 2013 ALL MR (Cri.) 2712 wherein Hon. High Court held that during enquiry under Section 88 of the MCS Act, enquiry officer did not find any incriminating material against the accused then it is fit case for quashing the FIR.*
- b. *2015 ALL MR (Cri.) Journal 200 Ganesh Raj Vs state of Rajasthan wherein Hon. Rajasthan High Court Bench Jaipur held that second or successive bail application is maintainable if there is subsequent change in fact situation or in Law or if earlier finding has become obsolete.*
- c. *2020 ALL MR (Cri.) 4325 Mahadeorao Rajurkar Vs The State of Maharashtra wherein Hon. Bombay High Court Bench Nagpur held that when FIR was not held by auditor but filed by President of the Society on the basis of report of the auditor then FIR deserved to be quashed.*

06. Ld. APP filed its say at Exh. 381 and submitted that offences under which present accused is charge sheeted are serious one. All the documents filed on record are sufficient to proceed against the accused therefore without giving an opportunity of trial on merit it can not be concluded that accused has not committed said offence. Hence it prayed for rejection of the application.

07. Perused the record. Heard advocate for the accused. Present application is moved by accused no. 6 under section 239 Cr.P.C. hence before adverting to the merit of the application let me reproduce provision here,

Section 239- When accused shall be discharged-

If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

08. It is admitted fact on record that this is second application for discharge filed by accused no. 6. His earlier application is rejected by my Ld. Predecessor with reasoned order vide Exh. 374. Therefore before going into merit of the case it is important to see that if the present application is maintainable or not. According to defense counsel as per the judgment of Hon. High Court in Ganesh Raj Cited supra in which reference had been made in respect of whether second or subsequent bail application under Section 438 Cr.P.C. is maintainable or not? And same is answered by the Hon. High Court in the affirmative holding that second application is maintainable if there is change in fact situation or in law or if earlier finding has been obsolete. It is also held by the Hon. High Court in para 24 of the judgment that the principles of res judicata and such

analogous principles are not applicable in criminal proceeding.

09. Considering this legal aspect it has to be seen that are there any changes in fact situation or law or if earlier finding has become obsolete. Following are the subsequent grounds according to the present accused,

- A. Present complaint is not filed by the appropriate person as per Section 81-1(5)(B) of the Maharashtra Co-Operative Societies Act.
- B. Present accused was not in service in the said Bank during the period when alleged offence is committed.
- C. No offence under Section 420 and 406 of IPC made out against the present accused.
- D. As per page no.148 of the charge sheet present accused is discharged considering report submitted under Section 88 of the Maharashtra Co-Operative Societies Act. As per page no. 349 of the charge sheet Handwritings Experts shows that it does not match with the handwriting of the present accused.
- E. Statements of witnesses Umesh and Shila do not show involvement of present accused in the offence.

10. I also have gone through the earlier application filed by the present accused vide Exh. 347 it specifically shows same objections were raised by the present accused at that time also. Admittedly same is rejected by the Court with reasoned order. Present application short for consideration as accused failed to made out any subsequent situation arisen which called for reconsidering his prayer of discharge. Authorities cited by defense counsel are the judgments of Hon. High Courts while dealing with the prayer of quashing FIR and not in respect of discharge of accused. Therefore with due respect said authorities are not helpful to the

accused. Proceeding of quashing of FIR and considering discharge application are poles apart. My Ld predecessor has already gave finding that there is prima facie case against the present accused hence such finding can not be reversed by this Court itself as it is not proper forum to revise the same. Therefore present application for devoid of merit stands rejected.

Date : 21.11.2022

(Smt. Ranjana Vijay Kamble)
Judicial Magistrate First Class,
2nd Court, Miraj.

C E R T I F I C A T E

I affirm that the contents of this P.D.F. file Judgment/Order are same word to word, as per the original Judgment/Order.

Name of Stenographer	:- Mr. Sandip Shankar Shingana			
Name of Court	:- 2 nd Jt. Civil Judge (J.D.) and Judicial Magistrate First Class, Miraj, Dist., Sangli.			
Date of decision / typed	:-	21	11	2022
Judgment/order signed by the P.O. on	:-	22	11	2022
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