

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CRIMINAL REVISION APPLICATION NO. 26 OF 2004
CRIMINAL REVISION APPLICATION NO. 28 OF 2004**

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CRIMINAL REVISION APPLICATION NO. 26 OF 2004

Mahsul Karmachari Sahakari Pat ..Applicant
Sanstha Limited, Parbhani,
Through Shri Sudam s/o. Sudarrao Jadhav,
Age. 35 years, Occ. Service,
R/o. Parbhani.

Versus

1. The State of Maharashtra ..Non-applicants
2. Avdhut s/o. Janardhan Kulkarni
Age. 52 years, Occ. Service,
R/o. Parbhani, Dist. Parbhani.

WITH

CRIMINAL REVISION APPLICATION NO. 28 OF 2004

Mahsul Karmachari Sahakari Pat ..Applicant
Sanstha Limited, Parbhani,
Through Shri Sudam s/o. Sudarrao Jadhav,
Age. 35 years, Occ. Service,
R/o. Parbhani.

Versus

1. The State of Maharashtra ..Non-applicants
2. Ramakant s/o. Achyutrao Chaudhari,
Age. 58 years, Occ. Service,
R/o. Nanal Peth, Parbhani.

Mr. P.K. Ippar, Advocate h/f. Mr. S.J. Salunke, Advocate for the applicants.

Mr. K.N. Lokhande, A.P.P. for non-applicant No.1/State.

Mr. S.P. Katneshwarkar, Advocate for non-applicant No.2 in Cri.Rev. Appln. No.26 of 2004.

CORAM : Z.A. HAQ, J.

DATED : 28.11.2016

ORAL JUDGMENT :-

. Heard. These two Criminal Revision Applications can be disposed by common judgment, as they arise out of the common judgment passed by the Sessions Court in the appeals filed by the accused.

02. The case of the prosecution is that on the report given by Mr. Shivprasad Nagori – Auditor on 1st September, 1990, Crime No.128 of 1990 came to be registered against both the accused for the offence punishable under section 409 read with section 34 of the Indian Penal Code. In the investigation, it was found that accused No.1, who was the Chairman of the co-operative society at the relevant time and accused No.2 who was working as the Junior Clerk with the co-operative society at the relevant time had misappropriated an amount of Rs.1,27,820=20, having retained the amount with themselves. After investigation, the charge-sheet came to be filed before the learned Chief Judicial Magistrate, charge came to be framed and as the accused did not accept guilt, the trial was conducted. After conducting

the trial, the learned Chief Judicial Magistrate recorded that the prosecution has proved that accused Nos.1 & 2, being public servants and working as Chairman and Clerk of the co-operative society, committed criminal breach of trust by retaining the amount of Rs.1,27,820=20 during the period from 1st July, 1986 till 30th July, 1998. The learned Chief Judicial Magistrate convicted both the accused for the offence punishable under section 409 read with section 34 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for one year and to pay fine of Rs.5000/- and in default of payment of fine, to undergo further rigorous imprisonment for three months.

. Both the accused filed appeals before the Sessions Court and challenged the judgment passed by the learned Chief Judicial Magistrate. The learned Additional Sessions Judge, by the impugned judgment, recorded that the prosecution has failed to prove that the accused retained an amount of Rs.1,27,820=20 in the capacity as public servants working as the Chairman and Clerk of the co-operative society and that the accused misappropriated the above amount in the capacity as public servants. The learned Additional Sessions Judge allowed the appeals and set aside the judgment passed by the learned Chief Judicial Magistrate convicting both the accused.

03. The co-operative society has challenged the judgment passed by the Sessions Court in this Revision Application.

04. With the assistance of the learned Advocate for the applicant/co-operative society and non-applicant No.2 in Criminal Revision Application No.26 of 2005 and the learned A.P.P., I have examined the record and have gone through the judgment passed by the learned Additional Sessions Judge.

. The learned Additional Sessions Judge has set aside the judgment passed by the learned Chief Judicial Magistrate principally on two considerations;

(i) that both the accused were earlier prosecuted for misappropriation of an amount of Rs.2200/- and this amount is included in the amount alleged to have been misappropriated, for which the prosecution out of which this revision arises came to be initiated against both the accused;

(ii) that both the accused are not public servants and therefore they could not have been convicted.

05. The considerations of the learned Additional Sessions Judge are based on misconception of law. The charge against the accused is that they have misappropriated the amount of Rs.1,27,820=20 and the prosecution cannot be said to be vitiated only because the amount of Rs.2200/- which was earlier misappropriated is included in the amount alleged to have been misappropriated by the accused.

. Similarly, conviction of both the accused was for the offence punishable under section 409 of the Indian Penal Code, which provision is not restricted in respect of offence by public servant only. The learned Additional Sessions Judge has erroneously applied the judgment given by the Hon'ble Supreme Court in the case of State of Maharashtra Vs. Laljit Rajshi Shah & Ors., reported in AIR 2000 SC 937 to conclude that the conviction of the accused for the offence punishable under section 409 of the Indian Penal Code is unsustainable, as they are not public servants. The judgment given in the case of Laljit Rajshi Shah considered the legality of the prosecution for the offence under section 5(1) and section 5 (2) of the Prevention of Corruption Act, 1947 and not for the offence under the Indian Penal Code.

06. As I find that the very basis of the judgment passed by the learned Additional Sessions Judge is erroneous, the judgment is required to be set aside as unsustainable in law and the matter is required to be remitted to the Sessions Court for reconsideration. As the matter is required to be remitted, I have not dealt with the merits of the matter.

. Hence, the following order :-

(i) The judgment passed by the learned 3rd Additional Sessions Judge, Parbhani, in Regular Criminal Appeal Nos.38 of 1996 and 39 of 1996 on 09.10.2003 is set aside.

(ii) The matter is remitted to the learned Principal Sessions Judge, Parbhani. The learned Principal Sessions Judge may decide the appeals himself or make them over to any other Court.

(iii) The learned Sessions Judge shall decide the appeals after hearing the parties. It is clarified that the parties should not be permitted to lead further evidence and the appeals shall be decided on the basis of the material already on record.

(iv) The Public Prosecutor and accused No.2-Avdhoot s/o. Jankiram Kulkarni (Avdhut s/o. Janardhan Kulkarni – as mentioned in cause title of Cri.Rev.Application No.26 of 2004), shall appear before the Principal Sessions Judge, Parbhani on 16th January, 2017 at 11=00 a.m. and abide by the further orders in the matter.

(v) The interim orders, if any, which operated during the pendency of the appeals, shall continue to operate until further orders are passed by the Sessions Court.

(vi) The present applicant – Mahsul Karmachari Sahakari Pat Sanstha Limited, Parbhani may seek permission of the Sessions Court to assist the prosecution and oppose the appeals.

. The Criminal Revision Applications are allowed in the above terms.

[Z.A. HAQ, J.]