IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

Criminal Appeal No.278 of 2002

The State of Maharashtra
Through the P.S.I. Kranti Chowk
Police Station, Aurangabad. .. **Appellant.**

Versus

Ramkrushna Prahllad Dongardive,
Age 38 years,
R/o. Building No.6, Block No.61,
M.I.G. Mahada Colony,
Aurangabad. .. **Respondent.**

Shri. P.G. Borade, Additional Public Prosecutor, for appellant.

Shri. B.S. Kudale, Advocate, with Shri. R.S. Deshmukh, Advocate, for respondent.

Coram: T.V. NALAWADE &
S.M. GAVHANE, JJ.

Judgment reserved on : 29 September 2017

Judgment pronounced on : 12 October 2017

JUDGMENT (Per T.V. Nalawade, J.):

1) The appeal is filed by the State against the judgment and order of acquittal given in favour of the

respondent by the learned Chief Judicial Magistrate, Aurangabad in Regular Criminal Case No.80163/1996. The respondent is acquitted of the offence punishable under section 409 of Indian Penal Code. Both the sides are heard.

2) In short, the facts leading to the institution of the appeal can be stated as follows :

The respondent was working as Cash Counter Clerk in the office of Telephone Department situated at Anvikar Building, District Engineer Office, Aurangabad. The misappropriation of the amount took place between the period from 1-7-1993 to 9-10-1993. His duty involved acceptance of bill amount from the customers of telephone department, issue receipt of the amount paid by the customer and prepare list of the customers who had paid the bills on every day. He was to deposit the amount received by him till 1.00 p.m. on everyday in the account of the office in the bank and the amount received subsequently was to be handed over to the Main Cashier along with the aforesaid daily list. During the aforesaid period he collected amount of Rs.8,73,737/-. He did not deposit the amount received prior to 1.00 p.m. daily. The misappropriation was detected as the other Clerk who was in-charge of the Subscriber Record Card and who was expected to issue show cause notice if the amount of bill was not deposited in the prescribed time, issued such notices and some customers came to the office with the receipts of the amounts paid by them. As per the procedure on the basis of the daily list prepared by the respondent, entries are required to be made on Subscriber Record Card and as the accused had not mentioned the names of so many customers in the daily list and the amount was also not deposited in the bank account and no amount was handed over to the main cashier, such notices were issued by the Clerk in charge of the Subscriber Record Card. The office realized that the receipts shown by the customers to whom show cause notices were issued were not from the authorised receipt books. Due to these circumstances show cause notice was issued to the respondent. He did not reply the notice. He then did not turn up to the office.

3) Due to the aforesaid circumstances the Department of Telephone made inquiry and it noticed that amount of Rs.3,88,035/- was deposited by the accused late in the bank by creating duplicate receipts in authorized receipt books but he had not deposited the amount of Rs.4,75,702/- which was collected from customers. Accused then produced some record like a receipt book No.552 and gave a letter to inform that he had not turn up as he was collecting money to deposit it in office. As the accused did not offer proper and satisfactory explanation the report was given and the crime came to be registered at CR No.304/1993 in Kranti Chowk Police Station Aurangabad for offences punishable under sections 409, 420, 477 of Indian Penal Code. Police collected copies of relevant record and statements of staff members of the office came to be recorded. Some record was recovered from the house of the accused. Statements of some customers who had paid amount but whose amounts were not shown in the daily list prepared by the accused also came to be recorded. Charge sheet came to be filed for offences punishable under sections 409, 420, 477 of Indian Penal Code against the accused. Charge was

framed and plea was recorded. The accused pleaded not guilty.

4) To prove the offences, the prosecution examined in all 16 witnesses. In the statement recorded under section 313 of the Code of Criminal Procure, the accused took the defence of total denial. No defence evidence is given. The trial Court has held that no specific substantive evidence is given on exact amount misappropriated. The trial Court has observed that when customers have no grievance against the Department, it cannot be believed that the accused has misappropriated the amount. The trial Court has discarded the evidence of recovery of more than 40 documents made from the residential place of the accused by holding that on the copy of panchanama or on the list signature of the accused was not obtained. Thus, on the basis of oral evidence without referring to the documents which are duly proved, the trial court has decided the matter.

5) The accused has not disputed that he was working as Cash Counter Clerk between the period 1-7-

1993 and 9-10-1993, for more than 3 months. Copy of appointment letter on the said post is produced in the evidence of PW 1 as Exhibit 6. On the basis of inquiry the report was given by Ashok Joshi (PW 1) and so his evidence needs to be considered first.

6) Joshi (PW 1) has given evidence on nature of the duties which were to be discharged by the accused, Cash Counter Clerk. He has deposed that the accused was to accept the bill amount from customers as per the amount mentioned in the bills issued to the customers. He has given evidence that the amount which was collected up to 1.00 p.m. every day was to be deposited in the account of the office which was opened in State Bank of India. He has deposed that the amount collected after 1.00 p.m. every day was to be handed to the Main Cashier. He has deposed that it was the duty of the accused to prepare daily list in respect of the customers who had deposited the bill amount every day and the list was to be handed over by the accused to Junior Accounts Officer of the office. One Mrs. Kolhe was holding that post at the relevant time. Joshi took over the charge of Smt. Kolhe on

31-7-1993 and so he has the personal knowledge about the incidents which took place after that date.

7) Joshi (PW 1) has given evidence that Padalkar, another Clerk of the office issued notices to the customers and one such notice was issued to customer Mr. Adwant for non payment of telephone bill. He has deposed that after 4 days, said Adwant came to the office and said that he had already deposited the bill amount and the notice was wrongly issued to him. He has deposed that Adwant showed the receipt to him and due to that on the next day he made inquiry as to how the notice was issued when Mr. Adwant had paid the amount. He has deposed that after making inquiry and due to existence of such receipt he gave notice to the accused. Office copy of the notice is proved at Exhibit 7. He has given evidence that the accused did receive this notice but the accused did not reply the notice. The contents of the notice show that it was informed to the accused that subscriber of Telephone Nos.24530 and 24920 had shown receipt No.031 dated 25-8-1993 issued by the accused but the said amount was not credited by the accused with the Government till 21-9-

1993. It was informed that when the amount was collected on 25-8-1993 the amount was credited to the Government on 21-9-1993 and so there was irregularity. This amount was Rs.3903/-. The accused was asked to explain as to why he was not having duplicate receipt of receipt No.031 dated 25-8-1993. The accused was expected to explain within four days. Admittedly, the accused did not respond to this notice. The contents of this notice are important as the receipts are required to be mentioned in the daily list and the receipt book having office copy (carbon copy, duplicate copy) is also required to be submitted along with the daily list. Thus, the accused had collected the amount under Receipt No.031 but in the daily list dated 25-8-1993 he had not shown this amount and the duplicate receipt with the receipt book was not handed over by the accused.

8) Joshi (PW 1) has given evidence that subsequent to the notice, the accused submitted to the office some record regarding the bills but the amount shown in the receipts of the receipt book were not accounted, deposited by the accused. The letter with which the accused produced record is proved at Exhibit

11 and the receipt book No.552 is given Exhibit 8 by the trial court. Exhibit 11 shows that on 9-10-1993 the accused informed to the office that he had left headquarters on 4-10-1993 for Nagpur as he was confused and he was to make arrangement of money. He informed that he then went to Bombay and from there he returned to Aurangabad on 8-10-1993. He informed that his wife had also met his superior officer and he had handed over all the record to A.O. (Accounts Officer), his superior officer. Exhibit 8 receipt book shows that the book was given No.552 and it was supposed to contain 300 receipts. However, in Exhibit 8 there were blank counter receipts bearing No.001 to 005 and there was no counter receipt of 031. He has deposed that the office then prepared the account in respect of the amount collected by accused which is Exhibit 9. He has deposed that this account contains the particulars of amount deposited by accused late like the amount of Rs.3,88,035 but the accused had not deposited the remaining amount of Rs.4,75,702/-. He has deposed on the basis of Exhibits 8 and 9 that the amount of around Rs.3 lakh was credited by the accused subsequently, on different dates and not immediately after

collection of the amount from customers. He has given instances in respect of some customers like Mr. Adwant to show that the amount collected from Adwant of Rs.4930 on 21-8-1993 but the amount was credited with the Government on 25-9-1993. Joshi has deposed that these receipts are in the handwriting of the accused and they are bearing his signatures. The F.I.R. given by Joshi is proved in his evidence as Exhibit 13. Though it is not specifically deposed by Joshi that specific number of receipts were used from Book No.552, when there is mention about it in F.I.R., on the basis of Exhibit 8, receipt book having duplicates, it can be said that as many as 105 receipts from this book were used by the accused though some carbon copies of the receipts like receipt Nos.001 to 005, receipt Nos.037 to 040 were blank from these numbers. On Exhibit 9, the account prepared there are some entries, the receipt numbers and they show that these amounts were subsequently deposited. Evidence is given by Joshi that Exhibit 9 was prepared by office and in it the office has shown the mount of Rs.3,88,035 as already deposited and the amount of Rs.4,75,702 as the amount which was not deposited by accused. This record was handed by the Telephone Department to police during investigation. It is brought on record during cross-examination of Joshi (PW 1) that Exhibit 9 was prepared by the office on the basis of record. Thus it cannot be said that no specific evidence is given about the exact amount misappropriated by the accused. It can be said that the trial Court did not show sincerity and virtually did not exert to see record of the case and decided the matter only on the basis of arguments advanced for the defence and with some presumption which was not available in law.

9) In the cross examination of Joshi (PW 1) it is brought on the record that receipt books are supplied by the Accounts Officer to the Cash Counter clerk. There is no record to show that Exhibit 8, receipt book No.552 was supplied to the accused and this circumstance is brought on the record in the cross-examination of Joshi and also in evidence of other clerk. It was responsibility of the accused to show that Exhibit 8 was authorised receipt book and it was supplied to him when specific evidence is of the Department that Exhibit 8 is not authorized receipt

book and it was not supplied through proper channel for its use. The subsequent evidence which is being discussed shows that there was some carelessness on the part of the concerned staff who was in charge of maintenance of the record of receipt books and it was virtually kept in open condition. This circumstance is misused by the accused. There are other circumstances like not showing the amount collected by him in daily list and not producing the receipt book bearing No.552 before the concerned and they show the *modus operandi* of the accused and his dishonest intention. Joshi is cross examined with regard to the work of making entries in cash book. His evidence shows that the receipt book and the list prepared by Cash Counter Clerk like accused are required to be checked by Accounts Officer daily and on that basis the entries are taken in cash book. This procedure does not help the accused in any way to create probability that he had deposited entire amount with the Government daily or that he had handed over the amount collected by him from customers after 1.00 p.m. to the Main Cashier. When the accused had not given proper account of the money collected daily, there was no question of making entries of that amount which was kept by accused with him in daily register. Due to this circumstance not much can be made out from the circumstance that these daily registers were not produced on record. The accused could have produced copies of that record if he was sure that he had credited that amount with the Government or he had handed over the amount to the Main Cashier. In the evidence of Joshi it is brought on record that he did not find any entry which was missing in daily list if it was compared with the receipt book. This circumstance also is not in favour of the accused. This is because the accused had prepared the daily list only in respect of the receipts issued by him from the authorised book and then the book with the daily list were handed over to the superior officer by him.

10) During cross examination of Joshi it was suggested to him that Padalkar, Clerk who has issued notices to the defaulting customers had not made inquiry with accused prior to issuing the notice. This suggestion is admitted. This admission also cannot make any difference as the evidence of Joshi shows that the entries in

Customer Card were to be made on the basis of daily list and the receipt book handed over by the accused. If the accused had not mentioned the names of the customers like Adwant in daily list on the day when he had collected the amount and he had not supplied duplicate receipt, carbon coy to the superior officer, the staff like Padalkar was not expected to make entry on the card of the customer and he was expected to issue notice of show cause to such customer. It appears that those cards of the customers were not produced before the Chief Judicial Magistrate and this circumstance is also considered against the prosecution.

11) Much was argued in the present proceeding by the learned counsel for the accused that as per the procedure the office was first preparing rough account of daily transactions and on that basis the registers were filled subsequently. Joshi (PW 1) did not admit that such procedure was used by the office. Even if the office was using that procedure that circumstance cannot help the accused in any way due to the circumstance already discussed.

12) In the cross-examination of Joshi it is brought on the record that against the customers to whom show cause notices were issued, further action was not taken by the office and the amounts mentioned in the notices were not recovered. Surprisingly this circumstance is considered in favour of the accused by the learned Judge of the trial Court. The evidence of Joshi and other evidence shows that when office realised the fraud, the office started inquiry against the accused and there was no question of asking the customers again to deposit that amount. Thus nothing could have been made by the trial Court out of this circumstance.

13) Witness Ramkrishna Kshirsagar (PW 2) was also working in the Telephone Department in the office of the accused. He has given evidence on the duty which was assigned to the accused. He has given evidence that on 30-9-1993 the customer Mr. Adwant came to the office as notice was sent to him and he was asked to deposit the arrears of telephone bill. He has deposed that Adwant had brought the receipt issued to him and so the receipt was shown to Clerk who had issued the notice viz Padalkar and

also Joshi (PW 1). He has deposed that on the receipt brought by Adwant date 25-8-1993 was mentioned but on inquiry it revealed that entry on the subscriber record card of this amount was made on 21-9-1993 showing that payment was made on 25-8-1993. Kshirsagar (PW 2) was the supervising officer and Joshi was working under him. He has given evidence that he had instructed Joshi to check daily list of receipts and the amount accordingly shown to be deposited with the Government. He has given evidence that on the basis receipt dated 25-8-1993 shown by Adwant he checked the daily list dated 25-8-1993 and he found that the amount paid by Adwant was not shown in the daily list by the accused. The daily list is produced in the Court as Exhibit 15 and in that document there is no entry of the amount shown to be deposited by Adwant. His evidence shows that by using the daily list, daily list books were prepared by the office and he has given evidence on that also. Unfortunately these books are marked as Articles A to C by trial Court and they are not considered in evidence.

14) Kshirsagar (PW 2) has given evidence that receipt book No.552 and also receipt book No.4804 were not issued to the accused as per the office record. He has identified signatures appearing on the receipts from Book No.552 (Exhibit 8) by saying that he knows and identities signatures and handwriting of the accused. Similarly he has identified the handwriting and signatures of the accused appearing on Receipt Nos.6 to 17 from receipt book No.4804. Receipt No.4804 is given Exhibit 16 and it is consistent with the oral evidence given by this witness. The amount mentioned above was in respect of receipt book No.552 and the evidence of Kshirsagar shows that by using receipts from Book No.4804 more amount was actually misappropriated by the accused and the total amount which comes out from the receipts used unauthorisedly was Rs.9,63,000/-.

15) In the cross-examination of this witness (PW 2) the procedure of the office is brought on the record. Kshirsagar (PW 2) is cross-examined in respect of the amount due from Dr. Dode by showing a bill issued to Dode and the payment made by him on 8-2-1999.

Surprisingly the witness was cross-examined on the basis of this document when the amount was actually deposited by Dode on 8-2-1999 when the Court was expected to consider the period from 1-7-1993 to 9-10-1993. In the case of Dr. Dode the bill period was from 16-12-1997 to 1-4-1998 and 16-10-1998 to 1-2-1999. This evidence need not be discussed and it is not at all relevant. Kshirsagar is cross-examined on the audit which is routinely done by Post and Telegraph Department Nagpur. That part of the evidence also need not be considered as the case of the office is very specific and the things which are noted already will definitely come on the record if the audit is done subsequently. To this witness also defence has suggested that some rough record was created before making entries in the cash book of daily transactions but he has also denied that suggestion. Further suggestion is given to him that adjustments of the entries were made and the amount which was credited by the customers was used for other purpose. These suggestions are also denied.

16) Bharat Kawade (PW3), a Clerk of the Telephone Department is examined to give evidence on the duties of the accused. He has given evidence that as per the procedure the receipt books were issued by the Accounts Officer (Kshirsagar) and the accused was getting the receipt books through Junior Accounts Officer (Joshi). In his cross-examination it is brought on the record that, entries in respect of transactions were initially taken in rough cash book and thereafter the Accounts Officer used to make entries in the main cash book. He has admitted that he also used to make rough record of the transactions and then he used to take entry in the main cash book and that included the transactions shown in the daily list prepared by the accused. It is brought on record in his evidence that during his period he did not find any mistake committed by the accused in respect of the account. Such evidence is bound to be there as the accused had mentioned only those amounts in the daily list for which he had issued receipts from authorised receipt books. It was argued by the learned counsel for the respondent – accused that rough cash book ought to have been produced by the prosecution due to nature of

admissions given by Kawade (PW 3) who was working as cashier. This submission is not acceptable as it is up to the accused to show that the amount shown in the aforesaid two receipt books were shown in the daily list by him. The record of daily list is produced by prosecution.

17) The prosecution examined Lata Kolhe (PW 5) who was working as Junior Accounts Officer prior to Joshi (PW 1). She has also given evidence on the nature of duties which were to be discharged by the accused. She was in charge of the post of Junior Accounts Officer from 2-2-1993 to 29-7-1993. She has given evidence on the procedure which is followed for issuing receipt book to persons like accused. Her evidence shows that during her tenure fraud was not detected and it was detected subsequently.

18) Kolhe (PW 5) has given evidence that receipt book at Exhibit 8 bears No.552 and receipt book bearing No.4804 (Exhibit 16) contains some some blank receipts but she has avoided to give specific evidence to say as to whether she had either issued or she had not issued

receipt books to the accused in the examination in chief. However, in her cross-examination it is brought on record that Accounts Officer issues only one receipt book at a time to the Cash Counter Clerk. Her evidence shows that as the fraud was detected during the tenure of Joshi she avoided to say few things by saying that she did not find any disputed document against the accused. It can be said that she was not taking proper care. She has tried to hide the aspect that at the relevant time accused was using more than three receipt books out of which only one receipt book was authorised and other receipts books were unauthorised.

19) Baban Wani (PW 10) is another employee of the Telephone Department and he was working as supervisor. Under him so many clerks were working and one of the clerks was assigned the duty of stationery and furniture. His evidence shows that they were collected receipt books from Bombay and Nagpur and some receipt books were kept in veranda near the stationery. He has tried to say that those receipt books which were kept in verandah were not requisitioned by his section and even the receipt

books which were kept in his own cupboard were not requisitioned by him. The nature of evidence given by this employee of the Telephone Department shows that due to fear of action against him for negligence he has tried to avoid to admit many things. In the evidence Baban Wani (PW 10) has deposed that he issued 10 receipt books and they were handed over to the accused in two installment of 5 each. He had obtained receipt in respect of issuing of the receipt books but that receipt surprisingly is not exhibited by the trial Court and that receipt is marked as article. The point of giving exhibit to the receipt was to be decided in the judgment but this point is not touched by the trial Court. The trial Court had not even perused the entire evidence given by the witnesses. This Court holds that the said receipt needs to be read in evidence and from that receipt it can be said that the aforesaid receipt books were not issued to the accused. His evidence shows that only after registration of the crime the entries were made in the register of receipt books of all the receipt books available.

20) In the cross-examination of Baban (PW 10) it is brought on the record that the receipt books need to be issued in chronological order and at the time of verifying the receipt books also they should be verified chronologically. This evidence is not certainly in favour of the accused as the receipts books used by him do not show that they were in chronological order.

21) The prosecution has examined Parshuram Dhotre (PW 11), handwriting expert to whom some receipts from the residential place of the accused like receipt Nos.001 to 005 from receipt book No.4809 which were recovered along other documents like receipt No.001 to 005 from receipt book No.4804 and the specimen handwriting were sent. He has given evidence that he had compared the disputed handwriting appearing on receipt of Book No.552 with the other handwriting supplied to him for examination and after comparing them he prepared the opinion which is at Exhibit 79. His opinion Exhibit 79 shows that he did not find significant differences in the disputed documents and admitted documents. The witness is cross-examined on his

knowledge and expertise. He has given evidence that when he joined the Government Department training was given to him on this subject and he had examined more than three lakh documents for giving opinion. He has given evidence in more than 200 cases in the Courts and he had given more than 2000 opinions in the past. The trial court has committed grave error to hold that this evidence cannot be considered and believed as he had not joined and completed the course of university in respect of the work as handwriting expert. Some other circumstances like want of independent witness on the recovery of some of the documents from the residential place of the accused is also considered as a circumstance by the trial Court. Though the evidence of the handwriting expert is not conclusive evidence it can certainly be considered as opinion of expert. It is up to the Court to decide as to whether opinion can be used as corroborative piece of evidence. In the present matter there is not only evidence of the handwriting expert but there is evidence of the colleagues of the accused who know the handwriting and signature of the accused and in their evidence it is duly proved that the disputed receipts are prepared by the accused they are in his handwriting and they bear his signatures.

22) The prosecution has examined some customers like Pradhan (PW 8) and Goyal (PW 9). Pradhan has turned hostile. During cross-examination of this witness learned APP had only put it to him that he had given statement before police that he had received notice even when he had paid the telephone bill. Unfortunately the record in that regard was not confronted to this witness.

23) Goyal (PW 9) has admitted that one STD Booth was standing in the name of wife of his brother. Inquiry was made with him by police in which he had given information that he had already paid amount of Rs.15552/- on 19-7-1993. He has tried to say that he did not receive notice for committing default. Evidence of this witness cannot be ignored that way and the record in that regard can be considered if it is exhibited.

24) The prosecution has examined three police officers who made investigation of the present matter.

Gore (PW 12) who was working as Police Inspector in Kranti Chowk Police Station had arrested the accused on 11-10-1993. He has deposed that during investigation he took search of the residential place of the accused and various documents like receipt book, duplicate copies of telephone bills and other documents are seized by him under seizure panchanama Exhibit 87. The panchanama is duly proved in his evidence. Panch witness examined on this panchanama has turned hostile. The learned Chief Judicial Magistrate has ignored this evidence by holding that the panch witness has turned hostile. There was no reason at all to Gore (PW 12) to give false evidence. Under panchanama (Exhibit 86), five blank receipt Nos.1 to 5 from receipt book No.552, one Receipt Book bearing No.4804 having receipts but not having receipt Nos.1 to 17 showing that they were used, receipt No.245 from Receipt Book No.557, receipt No.247 from Receipt Book 557 separately, receipt No.248 from Receipt Book No, 557, receipt No.299 from Receipt Book 558, receipt No.6 from Receipt Book No.560, receipt No.7 from Receipt Book 560, receipt No.8 from receipt book No.560, receipt Nos.80, 81, 148, 169 from receipt book 561, around 47 receipts from receipt book 562 separately, 5 receipts from receipt book 4803, two receipts from receipt book No. No.4815, one cheque in favour of State Bank of India dated 21-7-1993 of Rs.6335, 9 receipts from receipt book No.563, letter issued to the accused by Accounts Officer on 9-9-1993, duplicate copy of bill of telephone No. No.5169 of Waluj Exchange of Rs.200/-, the receipt of payment of bill of telephone no.26683 of Rs.3876, receipt of payment of bill of Telephone No.82141 dated 8-8-1992, receipt dated 27-9-1993 of Rs.10747 of Rajesh K. Surana, receipt No. 232 dated 27-9-1993 issued from receipt book No.564 for amount paid by cheque in respect of telephone No.21973, receipt No.221 from receipt book No.558 of telephone No.24474. Some other receipts and bills of the month of July 1993 which were dated 21-7-1993, 27-7-1993 etc. are recovered. Similarly the bills of August 1993, one list having 47 telephone numbers and mentioning specific amounts against those numbers are recovered.

25) It is already observed that there was no reason for Gore to create false record against the accused. The

evidence of Gore and the panchanama of seizure prepared by him show that all the record mentioned in the panchanama was of the office of the accused and the accused had no authority to take such record to his residential place. He had taken bills of the relevant period as the payment was made of those customers but that amount was not accounted for by him. Similarly many receipt books were found in his residential place. This is certainly an incriminating circumstance and it was necessary for the accused to explain this circumstance. The accused has not at all explained this circumstance. The trial Court has committed serious error in holding that due to absence of the signature of the accused on the panchanama showing that copy of it was supplied to him this evidence cannot be used against him. That requirement is not mandatory in nature and if there is convincing evidence, the investigation officer can be believed on such circumstance.

26) Digambar Gadekar (PW 13) who was also Police Inspector in Kranti Chowk Police Station and who made investigation after 9-12-1993 is examined by the

prosecution. His evidence shows that he obtained specimen handwriting and signature of the accused in the presence of panch witness for sending the same to handwriting expert along with the disputed handwriting. Panchanama in that regard is duly proved at Exhibit 91. There is no reason to disbelieve this witness also only because there is no independent evidence of panch witness on this incident. It is already observed that even if the evidence of the handwriting is ignored, there is evidence of the colleagues of the accused who identified the handwriting and signatures of the accused appearing on the disputed documents.

27) The aforesaid evidence if considered together shows that the receipt book No.552 was not supplied to the accused by his office, counters of the receipt Nos.001 to 005 were not filled and the receipts shown to be issued to the customers were recovered from the residential place of the accused by police. Receipts from receipt book No.4804 were also found at his residential place. Evidence given by the handwriting expert on these documents is already discussed. This evidence can certainly be

considered against the accused. The trial court has not given due weight to the opinion of the handwriting expert Exhibit 77 showing that these documents are in the handwriting of the same person, the accused. The reasons given by the handwriting expert are there and the evidence of the handwriting expert remained unshattered during his cross-examination. When the witness was given training by the Department and he has so much experience as mentioned already, there was no reason for not accepting opinion given by the handwriting expert. It is true that the customers who were examined by the prosecution to prove that notices were issued to them on the basis of their card by presuming that they have committed default have not supported the case of the prosecution, but that circumstance can go to the root of the matter. Cases of misappropriation of Government money need to be decided mainly on the basis of documentary evidence. If the documents can be read in evidence, the trial Court can base conviction on the basis of the documents. It cannot be said that the colleagues of the accused are interested witnesses. It is true that departmental inquiry was started against some colleagues of the accused but for that this Court has already made some observations that there was carelessness on the part of those employees. That circumstance cannot help the accused in any way. The record shows that daily lists prepared by the accused were produced before Court and they are referred in evidence by the prosecution witnesses. When the prosecution witnesses know the handwriting and signature of the accused, in ordinary course the trial Court ought to have used that record as evidence. That is not done by the trial Court.

28) The Telephone Office has given information in account statement about temporary and permanent misappropriation and it is proved. It appears that the learned APP who conducted the matter for the State did not take care to see that some record already mentioned is exhibited in the evidence of the employees of the Telephone Department. Benefit of this circumstance cannot be given to the accused. Similarly, the trial Court ought to have given exhibit to that record and the daily lists prepared by the accused and the trial Court ought to have read all those papers in the evidence. By not reading

that record the trial Court has committed serious error. Thus everything was on record but the trial Court has virtually overlooked that record. Entire daily list came to be marked as Article "C". The rest of the papers prepared by the accused was also marked as Article "B". Due to this approach of the trial Court, the trial Court has committed mistake. It can be said that the trial Court has concentrated only on the oral evidence when the trial Court ought to have read the documents in evidence. The documents were duly proved in the substantive evidence.

29) The aforesaid evidence shows that both the temporary misappropriation (of Rs.3.88 lakh) and misappropriation of more than Rs.4.75 lakh is duly proved by the prosecution.

30) Learned counsel for the accused placed reliance on some rules framed with regard to the maintenance of accounts. He produced copy of one such rule with regard to remittance to treasury. He submitted that whenever the amounts collected from customers are not deposited in the treasury and they are utilized by the

Department, the officer must at the end of the month send to the treasury office the cheque for the amount utilized with certificate that the amount was received by transfer credit to Telegraph Department. It is already observed that some suggestions in that regard were given to the Junior Accounts Officer and Accounts Officer but they have denied that they have used the amounts which were collected by the accused. For using this rule there needs to be the basic record of collection and utilization. The accused did not prepare collection record for office use in respect of amount misappropriated and the record in respect of temporary misappropriation of collection was prepared subsequently by the accused. Thus, this rule can be of no help to the accused.

31) Learned counsel for the accused placed reliance on some reported cases.

(1) *2016(5) Mh.L.J. (Cri.) 300 (State of Maharashtra vs. Mandabai).*

(2) *2003(3) Mh.L.J. 127 (Moreshwar vs. State of Maharashtra).*

(3) *(2003)(5) Mh.L.J. 243 (Bismillakha v. State of Maharashtra)*

(4) *2015 AIR SCW 1180 (Sudershan Kumar v. state of Himachal Pradesh).*

Facts and circumstances of each and every case are always different.

32) In the present matter this Court has considered all the relevant facts. There is also correspondence (Exhibit 11) of the accused which can be used as confession showing that he had misappropriated the amount and he was trying to collect the amount to deposit it with the Government. There was virtually no reason for the prosecution to falsely implicate the accused in such a serious case. The accused did this with planning and that can be inferred from the circumstances like he had taken record of the office to his residential place. He used peculiar *modus operandi* and that also indicates his intention to misappropriate. This Court holds that the offence is proved beyond reasonable doubt. He could have also been convicted for creation of false record but the charge was framed only for offence punishable under section 409 IPC against him. This Court holds that he needs to be convicted for offence punishable under

section 409 of IPC and he needs to be sentenced sufficiently so that other similar minded persons may learn lesson from this case.

33) In the result, the appeal is allowed. The judgment and order of the Chief Judicial Magistrate, Aurangabad delivered in Regular Criminal Case No.80163 of 1996 is hereby set aside. The respondent-accused stands convicted for the offence punishable under section 409 of the Indian Penal Code. He is sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.5000/-. In default of payment of fine, he is to undergo rigorous imprisonment for one more month. He is to surrender to his bail bonds to undergo the sentence. He is entitled to set off in respect of the period for which he was behind the bars after his arrest in the case. Copy of the judgment be given to the accused free of cost.

Sd/-
(S.M. GAVHANE, J.)

Sd/-
(T.V. NALAWADE, J.)

rsl