THE HIGH COURT OF JUDICATURE AT BOMBAY, BENCH AT AURANGABAD.

CRIMINAL WRIT PETITION NO. 370 OF 2017

Pradeep Vitthalrao Gaund,
Age: 46 years, Occ: Service,
R/o. Kharola, Tal : Renapur,
Dis. Latur. ... **PETITIONER**
(Ori. Complainant)

V E R S U S

1] Vasant Sambhaji Nagde,
Age 65 years, Occ. Service,
Ex. Chief Executive Officer,
R/o. Osmanabad, District Osmanabad.

2] Brijlal Sadashukh Modani,
Age 63 years, Occu. Ex. General
Manager, Chairman,
R/o. Osmanabad, Dist. Osmanabad.

3] Vishwasrao Jegdevrao Shinde,
Age 61 years, Occ. Ex. Chairman,
Director R/o. Osmanabad,
Ta. and District Osmanabad.

4] Limbraj Trimbak Davkharre,
Age 61 years, Occ. Service,
R/o. Osmanabad, Dist. Osmanabad.

5] Dinkar Narsing Phatepur,
Age 54 years, Occ. Service,
R/o. Osmanabad Janta Sahakari
Bank Ltd. Branch Renapur,
District Latur.

6] The State of Maharashtra,
Through Police Inspector,

Police Station Gandhi Chowk,
Latur, Dist: Latur. ... **RESPONDENTS**
(Resp. No. 1 to 5 Ori. Accused
No. 12, 13, 14, 1 and 5)

…

Mr. Anand V. Patil Indrale, Advocate for Petitioner

Mr. A. N. Irpatgire, Advocate for Respondent Nos.1 to 3 & 5.

Mr. A. V. Deshmukh, APP for Respondent No.6.

…

<u>WITH</u>

CRIMINAL WRIT PETITION NO. 363 OF 2017

Pradeep Vitthalrao Gaund,
Age: 46 years, Occ: Service,
R/o. Kharola, Tal : Renapur,
Dis. Latur. ... **PETITIONER**
(Ori. Complainant)

<u>V E R S U S</u>

1] Vaijinath Gnyanoba Shinde,
Age: 62 years, Occ. Business and
Agri., R/o. Sanskar Wardhini Colony,
Latur, Dist: Latur.

2] The State of Maharashtra,
Through Police Inspector,
Police Station Gandhi Chowk,
Latur, Dist: Latur. ... **RESPONDENTS**
(Resp. No. 1: Ori. Accused No.15)

…

Mr. Anand V. Patil Indrale, Advocate for Petitioner

Mr. A. N. Irpatgire, Advocate for Respondent No.1.

Mr. A. V. Deshmukh, APP for Respondent No.2.

…

CORAM : **T. V. NALAWADE, J.**
DATE : 04th March, 2019.

ORAL JUDGMENT:

. Rule. Rule made returnable forthwith. By consent, heard both the sides for final disposal.

2 The petitions are filed to challenge the decisions of the learned Additional Sessions Judge, Latur given in Criminal Revision Application No.13 of 2016 and Criminal Revision Application No.99 of 2015. Both the revisions are allowed by the Sessions Court and the order of issue process made by the learned Chief Judicial Magistrate, Latur in R.C.C No.258 of 2009 as against Accused Nos.1, 5, 12, 13, 14 and 15 is set aside.

3 This Court has carefully gone through the specific allegations made by the present Petitioner in the private complaint. He was working as a clerk in Ganj Golai Branch of Osmanabad Janta Sahkari Bank Limited, Latur. Accused Nos.1 to 4 were working as Branch Managers during the relevant time. Accused Nos.5, 8 and 9

were working as clerks in the said Branch at the relevant time. Accused Nos.6, 7 and 10 were working as passing officers in the said Branch. The Complainant was also working as clerk in that Branch at the relevant time. Accused No.11 was General Manager on the date of private complaint. Accused No.12 was Chief Executive Officer. Accused No.13 was General Manager at the relevant time. Accused No.14 was Chairman and Accused No.15 was Vice-Chairman at the relevant time.

4 Internal audit was conducted of this Branch for the period 2000-2005 and witness No.4 cited in the private complaint had conducted the internal audit. As in the internal audit many irregularities and possibility of misappropriation of amount was mentioned, one Advocate was appointed to make further inquiry. He gave report mainly against Accused Nos.1 to 10 and expressed that there was a probability of misappropriation of the amount of Rs.23,74,501/-. The misappropriation was in respect of fixed deposit, the amount shown as loan disbursed and recurring deposits. A peculiar *modus operandi* was used like replacing the fixed deposit receipts by using other receipts.

5 The learned counsel for original Complainant, Petitioner submitted that Accused No.8, who was working as a clerk at the relevant time, was brother-in-law of Accused No.13, General Manager of the Bank. The submissions made show that when departmental enquiry was started after issuing show cause notice, amount came to be deposited by Accused Nos.1 to 10. It appears that in the past, the order was made of investigation under Section 156(3) of the Code of Criminal Procedure and after making investigation, the police had submitted report in favour of the other Accused other than Accused Nos.1 to 10. In view of these circumstances, the order of issue process could have been accepted as against Accused Nos.1 to 10, but the learned Chief Judicial Magistrate had issued process as against Accused Nos.1 to 15. This Court has carefully gone through the order of issue process made by the Chief Judicial Magistrate. Though in paragraph No.6 of the order the learned Chief Judicial Magistrate has specifically mentioned that *prima-facie* case was made out on the basis of material like audit report and inquiry report as against Accused Nos.1 to 10, in paragraph No.7 of the order, the learned Chief Judicial Magistrate has mentioned that it was necessary

to call upon Accused Nos.1 to 15 to face charge in the matter and order of issue process was made as against Accused Nos.1 to 15. Thus, no material at all, which was noticed by Chief Judicial Magistrate as against Accused Nos.12 to 15 is mentioned in the order.

6 The learned counsel for Petitioners took this Court through other reasoning showing that as Accused No.1 was Branch Manager at the relevant time and Accused No.5 was working as a clerk at the relevant time, the auditor and the inquiry officer had noticed irregularities in their work and that material could have been considered for using Section 120-B of the Indian Penal Code, the learned Additional Sessions Judge has not considered that material from that angle. There is force in this submission. The aforesaid *modus operandi* shown to be used by Accused No.8 and there is the circumstance that all the Accused viz Accused Nos.1 to 10 after issuing of show cause notice deposited the entire amount of fraud and misappropriation. These circumstances can be definitely considered as a material to make out *prima-facie* case for the offences punishable under Sections 420, 467, 471, 120-B and also for the

offence punishable under Section 409 of the Indian Penal Code. Thus, the material is not looked from that angle by the learned Additional Sessions Judge. Considering the role, which the Branch Manager is expected to play and the role, which the clerk, Accused No.5 was expected to play, it cannot be said that apparently they had no role in the withdrawal of the amount by using aforesaid peculiar *modus operandi*. This Court holds that the learned Judge of the Additional Sessions Court has committed serious mistake in presuming that these are only irregularities and at the most they may amount to misconduct on the part of Accused Nos.1 and 5. To that extent, the order of the learned Additional Sessions Judge needs to be set aside.

7 The circumstance that Accused No.8 is brother-in-law of Accused No.13, cannot itself lead to an inference that Accused No.13 had role in the activity of Accused No.8. The learned counsel for Petitioners placed reliance on some observations made by the Apex Court in the case reported as ***2005 (1) SCC 237***, (*K. Hashim Vs. State of Tamil Nadu*). The relevant observations are at paragraph No.22 and they are as under:

“22. It would be appropriate to deal with the question of conspiracy. Section 120-B IPC is the provision which provides for punishment for criminal conspiracy. Definition of "criminal conspiracy" given in Section 120-A reads as follows:

> "120-A When two or more persons agree to do, or cause to be done, –
>
> (1) an illegal act, or
>
> (2) an act which is not illegal means, such an agreement is designated a criminal conspiracy.
>
> Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."

The elements of a criminal conspiracy have been stated to be (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish the object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. (See: American Jurisprudence, Vol.II, Sec. 23, p.559). For an offence punishable under Section 120-B the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, actus contra capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means."

8 There cannot be dispute over the proposition made by the Apex Court in the case cited supra. Considering the period involved and the *modus operandi* used by Accused and particularly Accused No.8, it is not possible to infer that at that stage there was a conspiracy hatched by Accused No.13 by joining hands with Accused No.8 and due to that the amount was misappropriated. The same can be said in respect of Accused Nos.12, 14 and 15. As no revision was filed by Accused No.11, this Court is not making any observation with regard to material available as against Accused No.11, who was General Manager on the date of complaint. This Court holds that the Sessions Judge has not committed any error in giving relief in favour of Accused Nos.12, 13, 14 and 15. In the result, the following order is passed:

<u>O R D E R</u>

I. Criminal Writ Petition No.370 of 2017 filed in respect of Accused Nos.1 and 5 is allowed. The decision given by the Sessions Court in the revision in their favour is hereby set aside and the order made by the learned Chief Judicial Magistrate of issue process as against them is restored. The remaining part of the writ petitions,

petitions filed as against other Accused like Accused Nos.12, 13, 14 and 15 stand dismissed.

II. Rule is made absolute in Criminal Writ Petition No.370 of 2017 as against Accused Nos.1 and 5 and rule stands discharged in respect of other Accused in both the petitions.

III. It will be open to the Trial Court to ascertain as to whether any other Accused needs to be tried by using Section 319 of the Code of Criminal Procedure.

[T. V. NALAWADE, J.]

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