

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

CRIMINAL APPLICATION NO.1264 OF 2010

Kishor s/o Babanrao Pakhale,
Age : 43 years, Occu.: Service,
R/o.: Pakhlewada, Naleswadi,
Kumbhar Nagar, Ahmednagar

... APPLICANT
(Orig. Accused)

VERSUS

The State of Maharashtra,
Through Police Station In-charge
Kotwali Police Station, Ahmednagar

... RESPONDENT

.....
Advocate for the Applicant : Mr. K. C. Sant
APP for the Respondent : Mr. A. R. Kale
.....

CORAM : N. B. SURYAWANSHI, J.

DATE : 3rd DECEMBER, 2019

ORAL JUDGMENT :-

1. Heard.

2. The application is filed challenging the impugned order dated 05.11.2009 (Exhibit-1) passed by the learned Judicial Magistrate, First Class (Court No.4), Ahmednagar thereby rejecting the report filed under Section 169 of the Criminal

Procedure Code in R.T.C. No. 509 of 2009.

3. Few facts as are necessary for decision of the present application are as follows :

Octroi Superintendent of the Ahmednagar Municipal Corporation lodged a complaint alleging that Anil Damodar Bankar and Kishor Babanrao Pakhale are working on the post of clerk in the Corporation. Their duty is to keep the entries of the amounts of the Corporation, to keep the account and to deposit the amount of Corporation in the treasury. On internal audit of the Corporation conducted by Mr. P. R. Gore on 13.04.2009, it was revealed that accused No.1 Anil Bankar and accused No.2 Kishor Pakhale (present applicant) have misappropriated an amount of Rs.25,000/- for their own benefit and did not deposit the said amount in the Corporation Treasury. Such report was submitted to the Commissioner, who directed to lodge offence. Accordingly, the complaint was lodged alleging that between 29.11.2008 and 13.04.2009, the two accused persons have misappropriated octroi amount of Rs. 25,000/- entrusted to

accused persons for their own benefit, on the basis of which CR. No. 128 of 2009 was registered with Kowali Police Station under Section 408 read with Section 34 of the Indian Penal Code against Anil Bankar and Kishor Pakhale (present applicant).

4. The Investigating Officer submitted report under Section 169 of Cr.P.C. dated 12.08.2009 to the learned trial Court to the effect the applicant was arrested on 04.05.2009 and was in police custody till 08.05.2009. In the investigation done till date, no evidence that the applicant has committed the offence is found. Hence, the applicant be exonerated under Section 169 of Cr.P.C.

The learned trial Court by the impugned order, refused to accept the report under Section 169 of Cr.P.C. and further directed the Investigating Officer to file supplementary charge sheet against the present applicant, within 8 days from the date of order. Hence, the present application.

5. Heard the learned counsel for the applicant and learned APP for the State. The learned APP has made available the

charge sheet during the course of argument. Perused the charge sheet, petition and annexures thereof.

6. The learned counsel for the applicant argues that from the investigation papers, it is clear that Anil Bankar accused No.1 was given an advance of Rs.40,000/- at the instance of Octroi Deputy Superintendent Mr. Buchkul. He pointed out the statement of Sanjay Tayade, clerk, who stated that he handed over amount of Rs.40,000/- to Anil Bankar at the instance of Octroi Deputy Superintendent Mr. Buchkul. Jitendra Sarsat, senior clerk stated that he accompanied Anil Bankar to Central Godown for bringing Rs.40,000/-. Anil Bankar was given an advance of Rs.40,000/- by Sanjay Tayade, who was a clerk at Central Godown. Deputy Superintendent Mr. Buchkul confirmed the fact that Sanjay Tayade called from Central Godown asking that, Anil Bankar is seeking an advance of Rs.40,000/- for office work and whether it should be given to him or not. The Deputy Superintendent told him to hand over the money. Thereafter, gave the said advance by handing over Rs.40,000/- to Anil Bankar. Anil Bankar did not meet the Deputy Superintendent.

Out of Rs.40,000/-, Rs.15,000/- was deposited by Anil Bankar after 8 days. However, though the Deputy Superintendent repeatedly asked Anil Bankar to deposit remaining amount of Rs.25,000/-, Anil Bankar failed to do so. In the light of these statements, the learned counsel for the applicant urged that the Investigating Officer was justified in filing the report under Section 169 of Cr.P.C. seeking exoneration of the applicant from the present offence.

7. The learned APP supports the impugned order stating that there is sufficient material on record to show the involvement of the present applicant in the offence and the learned Magistrate was justified in refusing to accept report under Section 169 of Cr.P.C.

8. On going through the charge sheet and the statements referred herein above, it is evident that there is absolutely no material showing involvement of the present applicant in the offence. The learned trial Court relied upon the statement of Auditor Mr. Gore while rejecting the report under Section 169 of

Cr.P.C. Perused the statement of Mr. Gore, who has stated that the present applicant and one Mr. Dandekar, peon, were on duty on 29.11.2008 between 8.00 a.m. and 4.00 p.m. At that time, advance of Rs. 40,000/- was given in the name of Jitendra Sarsat and Anil Bankar without any authorization. Out of that amount, Rs.15,000/- was deposited on 13.01.2009 and entry of it, is taken in charge register. However, remaining amount of Rs.25,000/- remained to be unpaid and no entry of deposit of Rs.25,000/- was found in the charge register. Thus, even the statement of auditor does not in any manner point out the involvement of the applicant in the crime.

9. There is non-application of mind on the part of the learned trial Court in rejecting the report under Section 169 of Cr.P.C. The reasoning adopted by the learned trial Court is contrary to the record and same is unsustainable and hence, liable to be quashed and set aside.

10. The learned counsel for the applicant placed reliance on the case reported in ***AIR 2019 SC 3801 (Ramswaroop Soni***

vs. State of Madhya Pradesh and another). The ratio of which is that, Magistrate cannot direct the police to file charge sheet. The Hon'ble Apex Court has held that in case a final report is filed by the Investigating Agency stating that no offence is made out against the accused, the learned Magistrate may accept report and close the proceeding, if he does not accept the report, he may take cognizance in the matter on the basis of such final report which was presented by the police and if he is not satisfied by the investigation so undertaken by the police, he may direct further investigation in the matter.

11. In the present case, the learned Magistrate has not adopted either of the course. If the ratio of the above authority is applied to facts of the present case, the impugned order passed by the learned Magistrate is unsustainable. The learned Magistrate was not justified in directing filling of charge sheet against the present applicant, particularly in absence of any material found during investigation showing involvement of the applicant.

12. Taking into consideration the aforesaid facts, there appears total non-application of mind of the learned trial Judge in passing the impugned order. Hence, the impugned order is unsustainable and same is liable to be quashed and set aside. Hence, the following order.

ORDER

- I) Rule is made absolute in terms of prayer clauses "B, C and D".
- II) Criminal Application is allowed.

(N. B. SURYAWANSHI, J.)

vsm/-