

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

58 CRIMINAL APPLICATION NO. 2444 OF 2006

Nitin Ramesh Khairnar,
Age: 32 years, Occ. Service,
R/o: Station Road, Bhandarkar Compound,
Amalner, Dist. Jalgaon

... APPLICANT

VERSUS

1. The State of Maharashtra
2. The Chief Officer,
Municipal Council,
Amalner, Dist. Jalgaon

...RESPONDENTS

....

Mr. B.R. Warma, Advocate for the applicant (Absent)
Mr. S.N. Kendre, APP for respondent No. 1
Mr. A.S. Golekgaonkar, Advocate for respondent No. 2 (Absent)

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CORAM : K.K. SONAWANE, J.

DATED : 25th MARCH, 2019

JUDGMENT :-

When the matter is called out, no one else appeared on behalf of applicant and respondent No. 2 - Chief Officer, Municipal Council, Amalner. Learned APP for respondent No. 1 is present. It is to be noted that the present application is pending since year 2006 for the relief against the impugned order passed by the learned Judicial Magistrate, First Class, Amalner, below Exhibit-37 in RCC No. 18 of 2003. In view of seniority of the matter, I find it justifiable to proceed further to adjudicate the present application on merit in absence of applicant and respondent No. 2. Therefore, with able assistance of learned APP I proceeded further to explore the circumstances for decision of present application on merit. The present application is filed seeking relief as under:-

"(A) To quash and set-aside the order dt. 20.7.2006 passed by the learned J.M.F.C. Amalner below Exh.37 in R.C.C. No. 18/2003 and grant permission for withdrawal of prosecution as prayed in application below Exh.37.

(B) To quash and set aside the entire proceeding of R.C.C. No. 18/2003 registered on the basis of chargesheet no. 5/2003 filed by respondent no.1 before the learned J.M.F.C. Amalner."

2. Learned APP for respondent No. 1 submits that the impugned order passed by learned trial Court, below Exhibit-37 appears to be just, proper and reasonable. The benefit of the Government Circular referred in the Judgment of this Court in the case of **Dagadu Shamrao Deshmukh Vs. State of Maharashtra** reported in **1983(2)Bom.C.R. 424** cannot be made applicable to the applicant, to allow the prosecution for withdrawal of Criminal Proceedings filed against the applicant. The learned APP explained the circumstances in detail and submits that there is no substance in the present application, and supported the impugned order passed by the learned trial Court.

3. Admittedly, the applicant-Nitin Khairnar and others were charge-sheeted for the offence punishable under Sections 408, 420, 464, 468, 471 and 477 read with section 34 of the Indian Penal Code. Pending the trial, the learned APP ventured to file application below Exhibit-37 for withdrawal of the prosecution against the present applicant by invoking remedy under Section 321 of the Code of Criminal Procedure.

4. It has been alleged that the amount of misappropriation worth Rs. 1,75,516.85 paise were already deposited by accused -applicant Nitin Khairnar, therefore, there was no financial loss to the Municipal Council, Amalner nor any financial loss to the public exchequer. Therefore, resorting to Government Circular dated 30th November, 1978 issued by General Administration Department, Government of Maharashtra as well as Government Circular dated 6th May, 1976 referred in the case of ***Dagadu Shamrao Deshmukh Vs. State of Maharashtra (Supra)***, prosecution be allowed to withdraw the proceeding against applicant. The learned prosecutor also raised issue of prosecution sanction under Section 79(1) of the Maharashtra Municipal Act, and therefore, he preferred the application (Exhibit-37) seeking permission to withdraw the proceedings filed against the present applicant.

5. The learned trial Court to ascertain applicability of the Government Circular referred in the case of ***Dagadu Shamrao Deshmukh Vs. State of Maharashtra (Supra)*** called upon the Chief Officer, Municipal Council to submit the relevant document of payment of misappropriated amount, its detail as well as audit report etc. The learned trial Court observed that applicant deposited the amount of misappropriation on 03-07-2002 i.e. after efflux of 30 days stipulated period, reckoned from the date when the department gets knowledge of the said defalcation or misappropriation of funds. The Civic Authority came to know about mischief on 18-05-2002. The Government Circular made it clear that if amount of misappropriation is deposited within a month from the date of notice of mischief of misappropriation, an

offence of criminal breach of trust is to be condoned. At this juncture, it is profitable to make reference of observations made by this Court in paragraph No. 8 of the aforesaid judgment in the case of **Dagadu Shamrao Deshmukh** reported in **1983(2) Bom.C.R. 424**, as follows:-

"8. The only portion of the Circular which is relevant for the purpose of this petition is Clause 'A' of para 2 of the same. Said Clause (a) of para 2 runs as follows :-

"Where the amounts misappropriated have been fully recovered or paid by the delinquents within one month from the date of misappropriation being noticed no prosecution should be launched and cases of this category already in the Court should be withdrawn. However, this will not preclude the action against the Sarpanch/Upa Sarpanch or a member under section 39 of the Bombay Village Panchayats Act, 1958."

It is unnecessary to paraphrase the above clause. It is enough to state that it reflects an unequivocal policy decision of the Government not to lodge prosecution against the delinquent employee if he has fully repaid the amount misappropriated within one month from the date when the misappropriation is noticed. Evidently, the word "noticed" in the above clause (a) means nothing else but the position that the accused would not be proceeded against in a Criminal Court if he repays the amount within one month from the date when the department gets knowledge of the said misappropriation. The word "noticed" does not and cannot mean that the responsibility of the delinquent employees starts only from the date he receives notice from the department to pay the amount. There is no reason whatsoever why such duty should be cast upon the Government to give a notice to the delinquent employee to pay the amount which he should not have, in the first place, misappropriated at all. It is further clear that if the

delinquent employee repays the amount to the Government within one month from the date when he gets knowledge that the entire game was over and that the factum of the misappropriation made by him had come to the knowledge of the Department, he gets a locus penitentiae by virtue of the clear policy decision contained in said clause (a)."

6. In the matter-in-hand, the defalcation was noticed on 18-05-2002 whereas applicant deposited the amount of misappropriation on 03-07-2002 i.e. after expiry of one month period stipulated under the aforesaid Government Circular. The learned trial Court has correctly appreciated the factual aspect and arrived at the conclusion that in case benefit of aforesaid circular is extended to the applicant and the prosecution was allowed to withdraw the criminal proceeding filed against the present applicant on technical ground, it may result in cynical disregard of law which would have its impact on the society at large and people may lose faith from judicial system. I find that the findings expressed by the learned trial Court appear just, proper and reasonable one. The application submitted by the learned APP for withdrawal of criminal proceeding pending before the learned trial Court on technical ground deserves to be dismissed being devoid of merit.

7. The learned trial Court also refused to allow the learned prosecutor for withdrawal of proceeding on the another ground of lack of prosecution sanction as contemplated under section 79(1) of the Maharashtra Municipal Council Act. It is to be noted that the learned trial Court has correctly dealt with the matter and observed that the issue of prosecution sanction by the Competent Authority in this case

would be an matter for consideration at appropriate stage but certainly not at the initial stage of the prosecution. Moreover concerned Chief Officer of respondent No. 2 filed affidavit-in-reply in this matter. In paragraph No. 5, the concerned Chief Officer ventures to make averments as follows:

"5. The deponent submits that, in present case, the Chief Officer himself has approached the investigating machinery i.e Police, on the basis of audit report. The audit report is received on 27/06/2002. On receipt of said report an enquiry was done and the letter by Chief Officer, AMC, was issued to the Investigating authority. Thereafter, in accordance with the process started, one Mr. Rohidas Mali, had filed a complaint on 2/6/2002. The offence is registered under Section 408 of IPC against the accused persons with the police station. Hence, Mr. Ramdas Mali had filed complaint on the say of CO. Even under the provisions of Audit Act, the Auditor as well as Chief Officer have been empowered to file a complaint. In such circumstances, the ground raised by applicant about sanction prior to filing of a complaint is unsustainable. Moreover, Court below has directed the Chief Officer to file his report prior to passing of the order below Exh.37 in RCC No. 18/2003. There, it has been observed that, at first instance, CO himself has approached to the Investigating Authority, by issuing letter. This itself shows that, there is sanction and hence, the ground raised is not sustainable."

8. I find that discretion exercised by the learned trial Court was within the purview of law. There is no infirmity or illegality in the impugned order passed by the learned trial Court. The issue of prosecution sanction raised on behalf of learned prosecutor for withdrawal of the matter would definitely the matter of evidence. It is

preposterous to allow the prosecution to withdraw the proceeding at the initial stage on the issue of prosecution sanction without giving opportunity to the concerned authority. It is also significant to take into consideration that respondent No. 2 Civic Authority, who lodged the FIR for penal action against applicant and others did not agree with the action of learned prosecutor for withdrawal of the proceedings by extending benefit of Government Circular on the ground of making payment of entire amount misappropriated by him. The interference in the impugned order passed by the learned Judicial Magistrate, First Class, below Exhibit-37 at the behest of applicant, is totally unwarranted. The application being devoid of merit, deserves to be dismissed. Accordingly, application stands dismissed. No order as to costs.

9. It is worth to mention that, the matter is pending since 2006, the learned trial Court is hereby directed to give top priority for its adjudication on merit as expeditiously at the earliest and preferably within a period of eight months from the date of receipt of writ of this order.

10. Accordingly, application stands disposal of in above terms. Rule is discharged.

Sd/-

**[K. K. SONAWANE]
JUDGE**

MTK.