

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION (APL) NO. 31/2022

Kishorsingh Kisansingh Chungde,
 aged 58 years, Occ. Government Auditor
 R/o. Rajputpura, Akola,
 Tq. & Dist. Akola.

... **APPLICANT**

VERSUS

1. State of Maharashtra,
 through PSO, City Kotwali,
 Akola, Tq. & Dist. Akola.

2. Narayandas Amarchand Malu,
 Aged 49 years, Occ. Business,
 R/o. Toshniwal Layout, Akola,
 Tq. & Dist. Akola.
 (Deleted as per Court's Order
 Dt. 25.03.2022.)

... **NON-APPLICANTS**

Mr. A.S. Mardikar, Sr. Advocate with Ms. A. Kshirsagar,
 Advocate for applicant.
 Mrs. M. Deshmukh, APP for non-applicant No. 1/State.

<u>CORAM</u>	: <u>VINAY JOSHI, J.</u>
<u>RESERVING THE JUDGMENT ON</u>	: <u>16/09/2022</u>
<u>PRONOUNCING THE JUDGMENT ON</u>	: <u>15/11/2022.</u>

JUDGMENT :

Heard.

2. **Admit.**

3. This is an application under Section 482 of the Code of Criminal Procedure ('Code') seeking discharge. The applicant (accused No.13) has initially applied to the learned Magistrate for discharge vide Exh. 141, however, the said application was rejected vide order dated 15.04.2017. Being aggrieved, the applicant has filed criminal revision No. 133/2017. However, it was dismissed vide order dated 06.11.2019, which is impugned herein.

4. The applicant is a Government Auditor. He has been arraigned as accused No. 13 in Crime No. 21/2011 registered for the offence punishable under Sections 406, 409, 420, 120-B, 166, 167, 217 and 218 read with Section 34 of the Indian Penal Code. The prosecution was initiated at the instance of report lodged by one of the depositor.

5. It is the prosecution case that the the Divisional Joint Registrar (Audit) directed the applicant to conduct audit of the affairs of the Brijlal Biyani Cooperative Credit Society, Akola ('Society') for the period from 01.04.2007 to 31.03.2009. Accordingly, the applicant has carried audit and submitted audit note on 03.06.2010. The applicant has also submitted special audit report to the Deputy Registrar, Cooperative Societies, Akola pointing the irregularities and discrepancies noted in the audit. The applicant sought opinion from

the District Government Pleader for lodgment of report to which he has been informed vide Communication dated 01.11.2010 to lodge the Police Report. The applicant has received a rectification report dated 05.01.2011 from the Co-operative Society informing that they have rectified the discrepancies and recovered the major amount as well as the disbursed to the members.

6. In the light of said communication, the applicant again sought opinion of the District Government Pleader about lodging of the Police Report, on which, vide communication dated 08.02.2011, it was informed by the District Government Pleader that if the audit objections are complied, then there is no question of lodging of the Police Report. In such a background at the instance of report lodged by one of the Depositor crime was registered against the Officer-bearers of the Society who are arraigned as accused Nos. 1 to 12, besides that the applicant Government Auditor was also arraigned as accused No. 13 alleging that he has helped the co-accused by non-filing of the Police Report. Principally, the applicant has been made accused on the charge of criminal conspiracy punishable under Section 120-B of the Indian Penal Code.

7. The learned counsel appearing for the applicant while claiming discharge submitted that the applicant has acted in his official

capacity and therefore, for want of sanction to prosecute in terms of Section 197 of the Code, the prosecution is not tenable against him. It is submitted that since the District Government Pleader vide communication dated 08.02.2011 has informed that there is no necessity to file report, therefore, it cannot be presumed that the applicant has assisted the members in deceitful manner. Moreover, it is argued that since the crime has been registered at the instance of the one of the Depositor, the prosecution is not maintainable in terms of Section 81(5B) of the Maharashtra Co-operative Societies Act.

8. The State resisted the application vide reply-affidavit dated 17.02.2022. Besides admitted facts, it is stated that the applicant has not taken action against the co-accused, therefore, he has connived for commission of offence. It is stated that the applicant has intentionally not taken action and therefore, sanction for prosecution is not required. According to the State, there is sufficient material to frame charge and therefore Courts below have rightly declined to discharge the applicant.

9. Most of the facts are not in dispute. The applicant is a Government Auditor who has been directed to conduct the audit of concerned Society for the aforementioned period. The applicant has issued audit note on 03.06.2010. It is not in dispute that initially the District Government Pleader has opined to lodge criminal complaint,

however, after rectification report opined by communication dated 08.02.2011 that if the objections are complied then there is no necessity to lodge report. The only charge against the applicant is of not lodging the Police Report against the Society's Directors and Office-bearers on the basis of irregularities and deficiencies found in the audit report.

10. Both the Courts below have held that the applicant has supported co-accused in their illegal activities by not filing the Police Report and therefore, the said cannot be termed to be within the discharge of his official duty. The learned Senior Counsel appearing for the applicant has seriously criticized the said reason by stating that the act of filing of the Police Report on the basis of audit report or its omissions is part of discharge of official duty and therefore, sanction for prosecution in terms of Section 197 of the Code is prerequisite. In this regard he relied on the decision of the Supreme Court in case of ***Indra Devi Vs. State of Rajasthan and others with another connected matter, (2021) 8 SCC 768***, wherein it has been ruled that the previous sanction for prosecution of the public servant is necessary whether the act or omission for which the accused is charged, has a reasonable nexus with discharge of official duty. The very purpose of Section 197 of the Code is to protect officer from unnecessary harassment when the

act or omission is committed in discharge of official duty. The act of filing a Police Report is certainly a part of official duty of the Government Auditor. Needless to say that the term act includes “omission”. There is no justification in saying that the alleged omission the on part of the applicant cannot be a part of his official duty. Therefore, the prosecution against the applicant on said sole count is not maintainable.

11. While resisting the point of sanction, the learned APP relied on the decision of the Supreme Court in case of ***Om Kumar Dhankar Vs. State of Haryana and another, (2012) 11 SCC 252***. In the said case, it has been observed that the offence of cheating and forgery by their very nature can be regarded as having been committed by the public servant while acting or purporting to act in discharge of official duty. The said ratio would not apply to the facts of this case since the applicant is charged for assisting co-accused in non-filing of criminal complaint. On the same point, the prosecution further relied on the decision of this Court in case of ***Narhari Sambhajirao Phatale Vs. Waman Sambhaji Dugar, 1967, Mh.L.J. 1988***. The case pertains to the officers of Co-operative Society relating of offence under Section 146 to 148 of the Maharashtra Co-operative Societies Act, therefore being different facts, the said decision would not assist the State in any

manner.

12. While denying the allegation of conspiracy, it has been argued that the applicant has throughout acted bonafidely. The learned Senior Counsel appearing for the applicant has submitted that the audit was fairly conducted, in which the irregularities have been pointed out. The applicant sought opinion of the District Government Pleader who initially opined to file report, however, after rectification report vide communication dated 08.02.2011 has opined that there is no necessity to lodge the Police Report. Pertinent to note that the applicant has immediately brought the said fact to the notice of Deputy Registrar, Co-operative Society as well as Divisional Joint Registrar about the said opinion.

13. Pertinent to note that first provision to Section 81(5B) of the Maharashtra Co-operative Societies Act, casts an obligation on the audit or to obtain written permission of the Registrar to file First Information Report, in case, during audit the concerned were found guilty for the offence relating to accounts. The said proviso was added in the statute by way of amendment of the year 2013, however audit note was of the year 2010 and thus, at that time, there is no statutory obligation. The State is unable to show the contrary. Besides that, perusal of entire charge-sheet, nowhere indicates material to construe

that the applicant has acted in connivance with the Society's members in the deceitful fraudulent activities. It is well settled that at the time of framing charge, it is permissible to sift the available material to limited extent to find out whether the case is made out to proceed further. The reply is totally silent to satisfy regarding existence of material even to make out a case of strong suspicion about commission of offence. Thus, the prosecution is not tenable for want of statutory sanction as well as in absence of sufficient material. The continuation of prosecution amounts to abuse of the process of Court.

14. In view of above, I hold that both Courts' below erred in rejecting discharge application. The application is allowed. Impugned order dated 06.11.209 passed in Criminal Revision No. 133/2017 is hereby quashed and set aside. The applicant is discharged from all levelled charges connecting to RCC No. 26/2013.

15. Application stands disposed of in above terms.

(VINAY JOSHI, J.)

Gohane

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signed by
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BHARAT
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