

(2011) 08 KAR CK 0123
In the Karnataka High Court
Case No : Criminal Appeal No. 1533 of 2004

A. Joseph Fathiraj

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 25-08-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Prevention of Corruption Act, 1988 — Section 13 (1) (d), 13 (2), 7

Citation : (2011) 08 KAR CK 0123

Hon'ble Judges : A.S. Pachhapure, J

Bench : Single Bench

Advocate : V.A. Rama Sharma, for the Appellant; C.H. Jadav, for the Respondent

Judgement

A.S. Pachhapure, J.—The Appellant has challenged his conviction and sentence for the offence punishable u/s 7 and 13(1)(d) R/w Section 13(2) of the Prevention of Corruption Act 1988 (hereinafter called as "the Act" for short) on a trial held by Special judge for CBI cases, Bangalore. The facts relevant for the purpose of this appeal are as under:

2, The Appellant, herein is the accused. PW1. P.K. Karunakaran is an officer in M/s. Elgi Tyres and Tread Limited, Bangalore and the firm was engaged in retreading of old Tyres and the factory was located at Rupena Agrahara Madivala, Bangalore.

3. During September 1988 the firm of PW1 had submitted a tender to Hindustan Aeronautics Limited Service Division, Bangalore complex for retreading/restoring of Tyres by cold process and the rates of M/s. Elgi Tyres and Tread Limited were accepted by Hindustan Aeronautics Limited in the first week of April 1989, accordingly M/s. Elgi Tyre and Tread Limited obtained a work order on 05.04.1989 from the Deputy General. Manager, HAL, Bangalore for retreading 525 Tyres. The total value of the contract was for Rs. 3,80,000/-.

4. For about a month there was No. response from Hindustan Aeronautics

Limited and in the month of May 1989 PW1 enquired that there is No. response as to when they would be getting Tyres for retreading and at that time the accused (Appellant) was dealing with the matter in the Tyre section of Hindustan Aeronautics Limited and asked PW.1. Karunakaran to meet him after few days. In view of this fact, Manager Sri. K. Padmanabhan met the Transport Manager and he told that the tyres will be handed over by first week of June 1989. On the next day, a telephone call was received in the office of M/s. Elgi Tyre and Tread Limited, instructing them to visit Hindustan Aeronautics Limited and inspect the Tyres retreading.

5. On 29.05.1989 PW1 and another went to the Transport Department of Hindustan Aeronautics Limited, Bangalore and met the accused. They inspected 100 tyres showed to them and selected 85 tyres found suitable for retreading. When the complainant asked the accused the reason for the delay in handing over the tyres, he told that the complainant has not approached him properly and that if he wants he can create problems for them and when the complainant understood the accused that there is a demand for money he undertook to consult the Manager and he asked him to keep the tyres ready for delivery and he returned back to his office.

6. On 30.05.1989 the complainant received a call from Hindustan Aeronautics Limited that tyres were ready for retreading and on 31.04.1989 the complainant visited Hindustan Aeronautics Limited and met the accused and took, up 50 tyres for retreading and at that time as well the accused asked whether any decision was taken and complainant told him in the negative. The accused did not say anything further. After few days the complainant delivered the tyres after retreading it in the central stores and met the accused and handed over a copy of delivery challan for processing the payment. The accused asked as to whether any decision was taken and the complainant told that the Manager would be there and he asked to meet him at area-office by 3.15 pm. On 08.06.1989 at about 3.00 pm the complainant reached the appointed place and found the accused and took him on the motorcycle to the area office of the complainant and at that time the Manager Mr. Padmanabhan asked him what exactly he wants and accused told that value of the contract is about Rs. 4,00,000/- and they should pay Rs. 10,000/- as bribe. He also threatened that in case if the payment is not made their firm will be blacklisted. Even on 14.06.1989 when the complainant had gone to take the delivery of tyres for the retreading the accused insisted for payment of the amount and also warned that there is No. further point in delaying the matter, they would approach the other tyre retreaders, Malanad Tyres.

7. On 26.06.1989 in the morning the complainant went to the office of the accused and delivered 34 tyres to the central stores. Before entering the Hindustan Aeronautics Limited, he was waiting near the security gate accused called him and asked to pay the amount, "tailing which he would delay the certification and payment. The accused also demanded the bribe amount and an

amount of Rs. 1,000/- in advance on the ground that he is in need and to pay by 27.06.1989. He also told to pay the remaining amount of Rs. 9,000/- within a week. The complainant assured to discuss the matter with the Manager and the higher officials and it is in these circumstances that PW.1 and the officials of the firm having no mind to pay any money to the accused, submitted their complaint to the CBI police on 27.06.1989 at about 9.30 a.m.

8. The complaint was registered, PW2 and PW3 the witnesses were secured by PW6 the police inspector CBI and the complainant Karunakaran produced 10 notes of Rs. 100/- denomination and an entrustment Mahazar was held by making a test after treating the notes with phenolphthalein powder and washing the hands of PW2 in sodium carbonate solution and the solution turned to pink colour and thereafter instructions were given to the complainant and PW2 and thereafter they went to the office-cum-residence of the complainant as the accused had told that he would come and collect the money from their office. The entrustment Mahazar was completed by 3.30 pm on that day.

9. Video coverage and audio coverage recording was also arranged in the premises of the complainant wherein the accused had to come to receive the bribe amount and a hidden video was placed in the bed room and also an audio graph. PWs.1 and 2 were at their residence and at about 4.30 pm the accused came on his scooter and parked his scooter outside and came to the complainant. Both together went to the bedroom. The Manager Mr. Padmanabhan was also there and at that time the; amount of Rs. 1,000/- referred to Supra which were treated with phenolphthalein powder were given to the accused, on his demand and he received the said notes from his right hand and thereafter came outside and sat on a bench by keeping the notes below his thigh. Meanwhile the complainant went outside and gave the instructed signal to CBI officer. They gained entry into the premises, they took the video graphs of the post-trap proceedings and at that time they asked the Appellant to produce the notes. The notes kept below the thigh of the accused were seized. Thereafter hand-wash of the accused in sodium, carbonate solution in two different bowls was taken and the liquid turned to pink colour. A Mahazar was held in respect of the proceedings after the trap. Thereafter the video graph and audio graph were seized., After recording the statement of witnesses a chargesheet came to be filed against the accused.

10. During the course of the trial the prosecution examined PWs.1 to 7 and in their evidence got marked exhibits PI to P18 and MOs.1 to 10. The statement of accused was recorded u/s 313 Code of Criminal Procedure He has taken the defence of total denial and got marked exhibit D.1 the Xerox copy of the Mahazar.

11. The trial Court heard the prosecutor and learned Counsel for the accused and on appreciation of the material on record convicted accused Appellant for the offence punishable under Sections 7 and 13, (1)(d) r/w 1.3(2) of the P.C. Act 1988 and ordered the accused to undergo Rule 1. for three years for the offence punishable u/s 7 of the Act and three years for the offence punishable u/s 18(2)

of the Prevention of Corruption Act. Aggrieved by the judgment and order the accused has preferred the present appeal.

12. I have heard the learned Counsel for Appellant and also the learned High Court Government Pleader for Respondent. The points that arise for my consideration are:

(i) Whether the prosecution proves that the accused while functioning as a public servant in the capacity of Senior Helper in the Tyre Section of the Transport Department of HAL, Bangalore, on 09.06.1989. demanded illegal gratification of Rs. 10,000/- from PW.1 P.K. Karunakaran for doing an official favour and repeated his demand on 26.06.1989 and accepted Rs. 1,000/- as bribe on 27.06.1989 at about 5.30 p.m. from PW1 as a part of the bribe amount and thereby committed an offence. punishable u/s 7 of the Prevention of Corruption Act 1988?

(ii) Whether the prosecution further proves that the accused being a public servant while functioning as a senior helper, on 27.06.1989 by illegal means, abusing his official position as such public servant obtained pecuniary advantage to the tune of Rs. 1.000 /- from PW1 - P.K. Karunakaran and thereby committed an offence punishable u/s 13(1)(d) R/w. 13(2) of the Prevention of Corruption Act 1988?.

(iii) Whether the accused has made out any grounds to warrant interference in the judgment and order of conviction and sentence?

13. At the first instance the learned Counsel for the Appellant would contend that the grant of sanction to prosecute the Appellant is not proved. So far as the person who granted the permission to prosecute the accused, is concerned, he was dead on the date of recording the evidence by the trial Court. PW.7 in his evidence states that he cannot identify the signature of the sanctioning authority, therefore the learned Counsel submits that, in absence of identification of the signature, the sanction stands not proved and therefore the prosecution is illegal.

14. On this aspect it is relevant to refer to provisions of Section 19 Clause 3(a) of the Act which is extracted here under for the sake of convenience.

Not with standing anything contained in the Code of Criminal Procedure 1973 (2 of 1974):

No. finding, sentence, or order passed by a special judge shall be reversed, or altered by a Court in an appeal, confirmation or revision on the ground of the absence, or any error, omission or irregularity in the sanction required, under Sub-section (1), unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby;

15. So as could be seen from the provisions referred to supra even the absence or error in obtaining the sanction is insufficient to alter the finding, unless the Appellant establishes that a failure of justice has been occasioned thereby. The

Appellant has not made out any such grounds of failure of justice in the absence of sanction, but now as could be seen from the records Ex. P18 is the sanction, which has been marked in the evidence of PW7 and it contains all that reference to the facts, application of mind and satisfaction of the sanctioning authority to prosecute the Appellant for the offence stated therein. The document is signed and sealed. Hence, I am of the opinion that Ex.P18 itself is sufficient to establish that there was a proper sanction to prosecute the Appellant. The learned Counsel for the Respondent would rely upon the decision reported in State of Madhya Pradesh Vs. Jiyalal, wherein it is held as under:

Held, aforementioned findings of High Court are incorrect - High Court therefore, was not justified in interfering with "finding, sentence or order" passed by Special Judge - Even if it were accepted that there was an "error, omission or irregularity" in passing sanction order, No. finding had been recorded, as to how serious failure of justice had been caused to Respondent - Further, it was not necessary for prosecution to examine DM to prove the same - Sanction order was clearly passed in discharge of routine official functions and hence there was a presumption that same was done in a bona fide manner.

I am of the opinion that the sanction has been satisfactorily proved and No. failure of justice has occasioned by any error or omission in the sanction order.

16. So far as the demand for an amount, of Rs. 10,000/- is concerned, PW1 has consistently stated about the demand made by the Appellant. In the complaint Ex.P1, it is stated by the complainant, that in the month of May 1989 and June 1989 and so also on 29.08.1989 whenever the complainant had met the accused, there was a demand for an amount of Rs. 10,000/- and the complainant expressed his difficulty and assured to discuss with the Manager and higher officials. It is in these circumstances that on 08.06.1989 the accused made a demand for an amount of Rs. 10,000/- which would be about 21/2% to 3% on the contract amount and in case if the demand is not complied, he would delay the supply of used tyres and would reject the retreading tyres.

17. The request was repeated by the accused on 14.06.1989 when the complainant, had taken action for getting the tyres for retreading. It was also repeated on 26.06.1989 when the complainant, had delivered 35 tyres to the central stores and there was an insistment to pay Rs. 1,000/- by 27.06.1989 and remaining Rs. 9,000/- within a week. It is at this juncture PW1 had further discussion with. Manager and higher officials. Finally, they decided to lodge a complaint, against the accused. The facts stated by PW.1 and the contents of the complainant would not reveal any ambiguity or discrepancy so far as the demand of Rs. 10,000/- by the accused. The learned Counsel for the Appellant draw the attention, of this Court to the cross-examination of complainant. Wherein, it is stated that he did not return to the office of the CBI till the trap was laid. So relying upon this answer of PW1 it is the submission of the learned Counsel that when the pre-trap Mahazar was held in between 2.00 to 3.30 pm on 27.06.1989, the evidence of PW1 reveals, that Ex.P3 the entrustment mahazar is conducted

and therefore he claims that No. reliance could be placed on Ex.P3. So far as Ex.P3 is concerned, it is not only PW.1, there is evidence of PW.2 the shadow witness and that of PW6 the investigating officer and who consistently stated in their evidence that the pre-trap Mahazar was held on 27.06.1989 in between 2.00 to 3.30 p.m., if a question was posed to PW.1 as to whether the pre-trap Mahazar was held on the date and the time stated, he could have recollected and could have answered in affirmative. When the question was as to whether he was in the office of CBI after lodging the complaint, in the morning at about 9.30 am till the trap was laid at about 5.30 p.m., PW1 by-oversight must have stated that he did not go to the office of CBI before the trap and after lodging the complaint. This inconsistency in the context of the other evidence led by the prosecution prima-facie appears to be by oversight and it is not sufficient to establish that Ex.P3 was created by the prosecution to falsely implicate the accused, in the crime.

18. So far as the trap is concerned, it is relevant to note that, the accused himself came to the residence-cum-office of the complainant for the purpose of receiving the bribe amount fixed was Rs. 10,000/- and the accused insisted to pay Rs. 1,000/- by 27.06.1989. It is the accused who approached the complainant on that day in the evening at about 5.30 p.m. and after entering the office-com resident of, with Sri. Padmanabhan the Manager and PW.1 and after discussing for sometime, he asked for the money and the complainant gave Rs. 1,000/- in the presence of PW.2. who was also sitting there as an accounts official and in the presence of Manager Sri. Padmanaham and PW2, the accused received Rs. 10,00/-, the bribe amount and took the same by his right hand and came outside the bed room and sat on a bench by keeping the amount just below his thigh. So far as the bribe is concerned there is the evidence of PW.2 and even prior to the entry of the accused in the premises of the complainant, PW.5 had hidden videography in the bed room, so as to cover the proceedings and the same video was played in the open Court and it reveals that the accused was sitting along with Sri. Padmanabhan on the bed and at that time PW1 picked out something from his pocket and gave it in the hands of the accused, who after counting the same held it in the right hand and came outside the office. Though the learned Counsel after viewing the video, stated that the object given is not money and it may be a cigar pack, his submission is improbable and unacceptable for the reason that after the amount was taken by the accused, he went out of the office from the bed room and kept the money just below the thigh and at the time of receiving the bribe, there was a videography and the amount received by accused was not clearly visible, as the videography in the bed room was not projected towards the hands of the accused. There is No. clear picture of the notes, but the consistent version of PWs.1 and 2 and corroboration by way of videography would lead to an irresistible conclusion that the accused received the bribe amount of Rs. 1,000/- and after acceptance of the same, he was trapped by the officials of CBI and both the hands of the accused were dipped in sodium carbonate liquid which turned to pink colour. So thereby, apart

from the oral evidence of PW.1, there is a videography and the chemical test of the hand wash was also taken and that has been stated by the witnesses including PW.6. So there is consistent evidence, so far as the demand of Rs. 1,000/- and payment of the same by PW1 the acceptance by the accused in the bed room of the office-cum-residence of the complainant.

19. A feeble contention is raised by the learned Counsel for Appellant that there is negotiation for purchase of the scooter of the accused and though the payment of Rs. 1,000/- may be towards the advance of sale consideration of the scooter of the accused with the complainant. This version of the accused seems unacceptable for the reason that none of the witnesses including PWs 3 and 2 have supported the version of the accused and the suggestions made have been denied and the facts does not reveal any sort of negotiation to purchase the scooter of the accused and: therefore the defence cannot be accepted.

20. A further contention was raised by the learned Counsel for the Appellant, that while the evidence was being recorded the sodium carbonate liquid, which was converted to pink colour was colourless on the date of recording the evidence and therefore he submits that the evidence of PWs.1 and 2 cannot be accepted as trust worthy. On this aspect of the matter, it is relevant to note that the incident took place on 27.06.1989 and the evidence of the witness was recorded on. 28.11.2002, that is, after about 12 years of the incident, it may be due to chemical reaction for the period from 1989 to 2002, the liquid could have lost its pink colour and thereby it cannot be said that the liquid was not pink at the time of trap, Mahazar. Therefore the submission of the learned Counsel that on the date of the evidence, MOs.1 and 2 were colourless cannot be sufficient to hold that after the trap, during the test it did not turn to pink colour. Furthermore MOs.1 and 2 were sent to the chemical examination and Ex.P16 is the certificate issued by the Forensic Science Laboratory and it reveals that on examination of the presence of Phenolphthalein and Sodium Carbonate were detected in MOs.1 and 2. This version strengthens the case of the prosecution and the fact that, the accused accepted the amount stands proved. When the demand and acceptance are proved, there is a presumption u/s 20 of the Prevention of Corruption Act 1988 and it is for the accused to establish by preponderance of probability that the prosecution case is false. Except the suggestion that: towards the negotiation of put chasing the scooter, the amount of Rs. 1,000/- is given, the same suggestion having been denied, there is No. nothing to rebut the said presumption.

21. The learned Counsel for the Appellant inviting the attention of this Court to the cross-examination of PW 1 at page No. 50 stated, that prior to the trap, he visited the office of CBI on 26.06.1989 and that he does not know whether his Manager PW.2 also accompanied him or not It is relevant to note that it is on 27.06.1989 the complaint Ex.P1 came to be filed and after lapse of about 12 years, the evidence of PW.1 was recorded and in such circumstances by mistake or by oversight he could have mentioned the date as 26.06.1989 instead of

27,06.1989. This is a minor discrepancy, which, is common in all cases due to lack of memory.

22. The learned Counsel also contended that the copies of the video cassette and audio cassette were not given at the time when the chargesheet was filed. It is relevant to note that Ex.P12 is the mahazar, which was drawn at the time of seizing the MOs.3 and 5 and 6 the copy of the Mahazar was given to the accused at that time, though the copies of the video cassette and the audio cassette were given at the later stage, after the seizure of MOs.3. to 5. They were played in the open Court during the evidence and in the circumstances it cannot be stated that MOs.3 to 5 were manipulated by the prosecution after opening the seized video graph even, before the trial Court. The video was played and though the Teamed trial judge has not made any observations. The said video was played before this Court and the contents are consistent with the version of the prosecution.

23. There is No. dispute that the Appellant Is the public servant and as such, he has received an amount of Rs. 1,000/- as bribe and he has not offered any satisfactory explanation for receipt of the same and he received the same from the complainant, and by using his official position received the pecuniary advantage and thereby committed the offence punishable u/s 7 and Section 13(2) (a) of the Prevention of Corruption Act. 1988. The evidence of PWs.1 and 2 and the shadow witnesses PWs.3 and 5 the persons who had brought the video graph, PWs.6 and 7, the investigation officers reveals clinching material to prove the offences stated supra. Hence I am of the opinion, that the Appellant has not made out any grounds to warrant interference, so far as the conviction is concerned. Though the learned Counsel has relied upon the decision of the Supreme Court reported in Tej Bahadur Singh Vs. State of U.P., wherein, there were many suspicious circumstances in the case of prosecution and the vigilance Sub-Inspector himself had gone to the place of the complainant, in addition to other circumstances, the Apex Court granted an order of acquittal, this principle does not apply to the facts on hand, as the accused herein is not the vigilance officer and the other circumstances which led to the acquittal are not available in the facts on hand and hence the principle laid down is not applicable.

24. Taking into consideration the nature of the offence the punishment provided and the amount that has been received as bribe, I think the sentence has to be reduced to one year each for the offences u/s 7 and 13(i)(d) R/w Section 13(2) of the Prevention of Corruption Act 1988 with the additional sentence as ordered by the trial Court. In that view of the matter, I answer point Nos. 1 and 2 in affirmative and proceed to pass the following;

ORDER

The appeal is allowed in part, confirming the conviction of the Appellant for the offence punishable u/s 7 and 13(1)(d) R/w Section 13(2) of the Prevention of Corruption Act 1988, The substantial sentence of imprisonment for each of the offences is reduced to one year confirming the fine and default sentence ordered

by the trial Court. The trial Court is directed to secure the presence of the accused to undergo the sentence.