
(2023) 04 BOM CK 0052

In the Bombay High Court

Case No : Criminal Revision Application No. 341 Of 2004

Asaram @ Ashok Pandharinath Kale

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 26-04-2023

Acts Referred:

Indian Penal Code, 1860 — Section 409

Code Of Criminal Procedure, 1973 — Section 161, 197, 313

Citation : (2023) 04 BOM CK 0052

Hon'ble Judges : S. G. Mehare, J

Bench : Single Bench

Advocate : Vikram R. Dhorde, S. P. Sonpawale

Final Decision : Allowed

Judgement

S. G. Mehare, J

1. By consent of the parties, the revision application is heard finally.
2. The accused takes exception to the judgment and order of conviction of the learned Chief Judicial Magistrate, Ahmednagar, in Regular Criminal Case No.153 of 1996, dated 19.08.1997, for the offence punishable under Section 409 of the Indian Penal Code (in short, "I.P.C.") and confirmed by the learned Additional Sessions Judge, Ahmednagar, by its judgment and order dated 10.08.2004 in Appeal No.62 of 1997.
3. The accused was a Tenancy Awal Karkoon in the Tahsil Office, Newasa, in 1990-91. There was heavy rainfall in that area. Hence, the Government had declared compensation for the rain-affected people. The compensation was to be disbursed at the war level. Therefore, the Collector, Ahmednagar, assigned the duties to the Talathis, Aawal karkoons and other staff. The accused was one of them discharging his official duty and arranging to pay compensation to the affected persons.

4. The allegations against the accused describe that he was to direct the Accountant to pay the money to the respective Talathis and get the account from the Talathis about the compensation money paid and not disbursed to the beneficiaries. The unpaid money was to be returned to him. The Talathis returned the balance amount to him. However, instead of depositing the amount of Rs.70,659/- with the Treasury, he misappropriated the amount and committed an offence punishable under Section 409 of the Indian Penal Code.

5. When the misappropriation of the compensation money was discovered, the Collector, Ahmednagar, vide its letter dated 03.05.1995, directed the Tahsildar to prosecute the accused. Accordingly, the first information report was registered against the accused. He was charged, tried and convicted.

6. Against two consecutive judgments of conviction, he has raised various legal grounds not considered by the learned trial Court and the Subordinate Appellate Court.

7. The learned counsel for the accused has vehemently argued that there was no sanction to prosecute the accused under Section 197 of the Code of Criminal Procedure, 1973 ("in short, "Cr.P.C."). Therefore, the entire trial vitiates. He also argued that most of the witnesses are Talathis, who have been examined, were not inquired into by the Investigating Officer and their statements were not recorded under Section 161 of the Cr.P.C. Both the learned Courts had committed a grave error of Law in relying upon the statements of the witnesses recorded before the Accounts Officer who had conducted the departmental inquiry. Similarly, the statement of the Accounts Officer, P.W.No.26 Damodar Maroti Adsule, was also not recorded under Section 161 of the Cr.P.C. Therefore, the accused did not have information and material about these witnesses in the form of their statements. Therefore, their statements are nothing but a piece of paper on record. He has also argued that the accused was to direct the Accountant to pay the money to the Talathi for disbursement. Therefore, the unpaid money was to be deposited with the Accountant, and the Accountant was to take the entries in the account book. In a few cases, the unpaid compensation amount returned to him by the Talathis was again disbursed to the beneficiaries as they were unavailable when the Talathis went to pay them compensation. He raised a question that the papers of the departmental enquiry cannot be the evidence in the trial lodged under the Code of Criminal Procedure.

8. It is a prerogative of the Investigating Officer to make an inquiry from the witness acquainted with the facts of the crime, and if he feels appropriate, he reduces their statements in writing under Section 161 of the Cr.P.C. He would also argue that the Law is well established that the accused must be informed in advance of what is the material against him and what he has to face in the trial. Since the statements of most of the witnesses were not recorded under Section 161 of the Cr.P.C. by the Investigating Officer, the right of the accused to know the statements against him has been taken away. This is a material illegality in this trial. Both Courts have totally ignored these important aspects

9. He has also argued that the witnesses are not consistent and confident on the facts that they had paid the remaining amount of compensation to the accused, and it was misappropriated. It was an emergent situation, and the sole object was to help the rain-affected persons. Therefore, the cash payment was made, which was an abnormal practice. The first informant died. Therefore, the F.I.R. is not proven. The alleged chits allegedly proved the acknowledgment has no evidential value. The accused was not assigned the duty as alleged. He relied on the cases of Labhshankar Magnalal Shukla Versus State of Gujarat, (1979) 3 Supreme Court Cases 391 and Vasant Moghe Versus State of Maharashtra, (1979) 3 Supreme Court Cases 771.

10. The learned counsel for the accused has vehemently argued that the prosecution has failed to prove the entrustment of the money; therefore, no offence as alleged was made out against the applicants. He prayed to allow the petition and, in an alternative, prayed to show leniency as the accused is running 75 and suffering from various physical ailments if the Court concludes that there are no grounds to interfere with the impugned judgments and orders.

11. The learned A.P.P. has strongly opposed the application. He would argue that the evidence led before the Court established the misappropriation of the money by the accused. The evidence has been properly appreciated. The witnesses were consistent. The entire circumstances were against the accused. He did not explain why he had retained the money. The chits which are proved on record were signed by the accused. The relevant register was also seized. The accused did not deny the signatures on the chits. The statements of the witnesses, though not recorded under Section 161 of the Cr.P.C. were admissible as the accused never objected before the trial Court. Since the first informant died, the F.I.R. has been duly proved through the person who knew the facts and the first informant. There are no grounds to interfere with the impugned judgments and orders. He prayed to dismiss the petition.

12. The legal question of whether the sanction under Section 197 of the Cr.P.C. was there to prosecute the accused must be dealt with first. The said Section speaks that unless the sanction to prosecute is obtained, the Court cannot take cognizance against a public servant not removable from office who allegedly misappropriated the public fund while acting or purporting to act in the discharge of his official duties. The burden was on the prosecution to prove that the sanction was obtained from the competent authority to try the accused.

13. The object of Section 197 of the Cr.P.C is to protect public servants against vexatious litigation and to ensure that they are not prosecuted for anything done by them in the discharge of their official duty without reasonable cause. Section 197 of the Cr.P.C. restrain the Court from taking cognizance of the offence against public servants except with the previous sanction. 'Cognizance' literally means knowledge or notice, and 'taking cognizance' of an offence means taking notice or becoming aware of the alleged commission of an offence. Obviously, the Judicial Officer has to ensure that whether Court can take cognizance of the

offence before he proceeds with the trial. The offence under Section 409 of the I.P.C. is against the public servant. Therefore, this Court is of the view in every case registered under Section 409 of the I.P.C., the Court before which the complaint is lodged, has to ensure that the sanction under Section 197 of the Cr.P.C., has been secured. The Court must avoid unwanted proceedings of such a nature. The prosecution is also bound to satisfy the Court that for an offence punishable under Section 409 of the I.P.C., sanction of the appropriate appointing authority has been obtained to prosecute a public servant. The Courts should not wait till the accused objects that there was no sanction to prosecute under Section 197 of the Cr.P.C. This Court thinks that primarily it is a duty of the Court.

14. In the opening paragraph of its judgment, the learned Chief Judicial Officer has observed that the Collector, Ahmednagar, vide its letter dated 03.05.1995, had directed to prosecute the accused. In the said letter, there was a reference to a letter from the Tahsildar and a confidential letter from the District Government Pleader. He has expressed the opinion that the accused has breached the trust by misappropriating the entrusted property. Hence, he directed the Tahsildar, Newasa, to lodge the report against the accused. Another question is whether the said direction was a sanction recognized by the Law. By catena of judgments of the Higher Courts, it is well settled that sanctioning leave to prosecute the accused is not a bare formality. It is an administrative act. The authority granting sanction has to apply its mind, examine the evidence against the accused and form an opinion that it would not be a vexatious prosecution. The provision regarding sanction must be observed strictly keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.

15. The letter dated 03.05.1995 addressed to the Sub-divisional Officer by the Collector, Ahmednagar, does not reflect the application of mind and the conclusion that he was satisfied with the material placed before it was sufficient to prosecute the public servant. It was a bare letter issued under his power. Therefore, it cannot be considered a sanction to prosecute the accused as required under Section 197 of the Cr.P.C. The record does not reveal that the learned trial Court examined before taking cognizance whether the sanction was obtained to prosecute the accused or whether the letter dated 03.05.1995 was a legal and valid sanction under Section 197 of the Cr.P.C.

16. As regards the sanction under Section 197 of the Cr.P.C., the learned Sessions Judge observed that the present case is in respect of the misappropriation of the amount by the accused when the amount was entrusted to him. In view of the said fact, it cannot be said that the rule laid down in the above case (*Ramesh Mahadeo Sawant v Daulatrao Lembe and another* 1998 (3) Mh.L.J. 229) is applicable in the present case. The Tahsildar had lodged the complaint against the accused regarding misappropriation. The order of the Collector is at Exhibit-130 (examining the record, there is no order of the Collector below Exhibit-130), which disclosed that the concerned person should

be dealt with. This itself shows that when there is misappropriation, the Tahsildar has lodged the complaint. Therefore, it cannot be said that there was no sanction and thereby, the trial is to be vitiated.

17. There was no other sanction order except the letter dated 3. 5.1995, which was, as held by this Court, not the sanction to prosecute the accused. In these premise, the above observation of the learned Sessions Judge regarding the sanction under Section 197 of Cr.P.C. is apparently illegal, incorrect and improper. Hence, the entire prosecution against the accused is vitiated.

18. The next legal point raised is whether witnesses can depose before the Court directly without recording their statements under Section 161 of Cr.P.C.?

19. The statements of many witnesses were not recorded under Section 161 of the Cr.P.C. However, they have been directly examined based upon their statements recorded by the Accounts Officer in departmental inquiry. The record reveals that the Investigating Officer had recorded the statements of many Talathis under Section 161 of the Cr.P.C., but the statements of only six Talathis were available on record.

20. Section 161 of the Cr.P.C. is about recording the statements of the witnesses acquainted with the facts of the incident at the discretion of the Investigating Officer. The statement under Section 161 of the Cr.P.C. can only be used for contradictions and omissions. Such a statement could be used by the prosecution as well as by the accused. The copies of such statements must be provided to the accused well in advance before framing charges. It gives information to the accused about what the witnesses have stated against him and whether it is true and correct. Such statements are part of the charge sheet and recorded during the crime investigation. The Investigating Officer, in the circumstances, reduced the statements of the witnesses to writing. It is also well settled that the departmental inquiry and criminal trial are independent, and the rules appreciating the evidence in both cases are distinct. In a criminal case, the prosecution has to prove the charges beyond a reasonable doubt. The said rule is not applicable in the departmental inquiry. In the departmental inquiry the evidence which has a probative value of reasonable nexus and credibility can be believed. In the light of this legal position, the Court comes to the conclusion that the witnesses examined without recording their statements under Section 161 of the Cr.P.C. were not competent to lead the evidence against the accused, and their deposition cannot be directly recorded on the basis of their statement before the Inquiring Officer. However, there is no bar to examining the witnesses other than those listed in the witness list, but a procedure has to be followed for examining such witnesses. A person who has not been examined under Section 161 of the Cr.P.C. may appear directly in the Court to depose against the accused. In such a situation, such a witness shall be sent to the Investigating Officer to record his statement under Section 161 of the Cr.P.C. Then he may depose before the Court.

21. The Talathis, whose statements were recorded under Section 161 Cr.P.C, were also examined before the Court. They have categorically deposed that they have returned the unpaid compensation to the accused, and he had acknowledged it on the compensation disbursement report. The accused did not protract anything from their cross-examination. In this situation, this Court believes that the prosecution has proved that the accused had misappropriated public money. Both the Courts have correctly believed these witnesses. Therefore, the Court does not find substance in the argument of the learned counsel for the accused that there was absolutely no evidence against the accused, and whatever evidence was there, it was inadmissible for want of their statements under Section 161 of the Cr.P.C.

22. It has also been argued that the benefit of the government circular dated 6th May 1976 ought to have been given to the accused. The State Government had issued a circular dated 6th May 1976 and took a policy decision not to file prosecution against its employee if the delinquent/employee pays the entire amount to the Government within one month from the date when the employee received the notice in that behalf from the Government. If he deposits money as per the said circular, the accused is entitled to protection from criminal prosecution under Section 409 of the I.P.C. The Bombay High Court, in the case of Dagadu Shamrao Deshmukh Vs. State of Maharashtra 1983(2) BCR 424 , had referred to the said Government resolution.

23. The burden was on the accused to prove that from the receipt of the notice from the Government, he deposited the entire amount allegedly misappropriated within a given time. The learned Sessions Judge referred to the notice dated 23rd January 1995 addressed to the accused, calling upon him to deposit the amount of Rs.70,459/- within ten days with the Government. However, there was no evidence before the Court that he had deposited the said amount as per the said notice. In view of these facts, the learned Sessions Judge has correctly observed that mere submission that the accused has deposited the amount of misappropriation would not be sufficient to believe him. The accused also did not state so in the statement under Section 313 of the Cr.P.C that he had deposited the misappropriated money as per the above circular.

24. Considering the arguments advanced by the respective counsels and examining the legal points raised by the learned counsel for the accused, this Court find that the offence under Section 409 of the I.P.C. was proved against the accused. However, there was no legal and valid sanction under Section 197 of the Cr.P.C. Therefore, the accused deserves discharge as the trial was vitiated.

ORDER

i) Criminal Revision Application is allowed.

ii) The judgments and orders of conviction of the learned Chief Judicial Magistrate, Ahmednagar, in Regular Criminal Case No.153 of 1996 dated 29.08.1997 and confirmed by the learned Sessions Judge, Ahmednagar, in

Appeal No.62 of 1997 by its judgment and order dated 10.08.2004, stands quashed and set aside.

iii) The accused stands discharged in the crime registered against him as the trial has been vitiated for want of sanction under Section 197 of the Code of Criminal Procedure.

iv) The bail bond and surety bond stand cancelled.

v) The surety stands discharged.

vi) R & P returned to the Court of the learned Chief Judicial Magistrate, Ahmednagar.

vii) Rule made absolute in above terms.