

(2010) 09 BOM CK 0190

In the Bombay High Court

Case No : Criminal Appeal No. 206 of 2009 in C.B.I. Spl. Case No. 78 of 2005

Ashanand Ramji Fulekar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 27-09-2010

Acts Referred:

Industrial Disputes Act, 1947 — Section 5(2), 6, 6(1)
Mahanagar Telephone Nigam Limited (Conduct, Discipline and Appeal) Rules, 1998 —
Rule 32, 38
Penal Code, 1860 (IPC) — Section 161, 164, 165
Prevention of Corruption Act, 1988 — Section 13(1), 13(2), 7

Citation : (2010) 09 BOM CK 0190

Hon'ble Judges : V.M. Kanade, J

Bench : Single Bench

Advocate : S.V. Kotwal, instructed by Sunil R. More, for the Appellant; P.S. Hingorani, APP, D.A. Nalavade Kiran and J. Kandpile, for the Respondent

Final Decision : Allowed

Judgement

V.M. Kanade, J.—Heard the learned Counsel appearing on behalf of the Appellant and the learned Counsel appearing on behalf of the CBI.

2. The Appellant is challenging the judgment and order passed by the 1st Additional Principal Judge and Special Judge (CBI) dated 28.1.2009. By the said order, the Special Judge was pleased to convict the accused for the offence punishable u/s 7 of the Prevention and Corruption Act, 1988 and sentenced to suffer R.I. for 2 years and to pay fine of Rs. 20,000/-, in default, to suffer R.I. for six months. He was also convicted for committing offence for the offence punishable u/s 13(2) r/w. 13(1) of the Prevention of Corruption Act, 1988 and sentenced to suffer R.I. for 3 years and to pay fine of Rs. 25,000/- and, in default, to suffer R.I. for 7 months. Both the sentences were directed to run concurrently.

3. The prosecution case is that the Appellant was working as Divisional Engineer

at Sion in MTNL. A complaint was filed by one Vinaykumar Tiwari, Authorised Signatory of M/s. Alex Joe and M/s. Narendra Enterprises. Both these firms were dealing in cable contracts of Mahanagar Telephone Nigam (MTNL). According to the said companies, they were receiving contracts from North Zone i.e. Sion area of Mumbai where the accused was working as Divisional Engineer. The case of the complainant is that two bills of cable laying works worth of Rs. 1,25,114/- and four bills pertaining to work done by M/s. Alex Joe were pending on the table of accused for approval. The prosecution case is that the Appellant-accused demanded Rs. 10,000/- per bill for clearance. A complaint, therefore, was lodged with Anti Corruption Bureau. The relevant procedure was completed and trap was laid and upon payment of the said amount, the complainant gave a signal to the raiding party, who immediately rushed to the spot and arrested the Appellant-accused. During the trap panchnama conducted by the prosecution, phenolphthalein powder was found on the hands of the accused and on the basis of the evidence on record, the Appellant-accused was convicted by the Special Judge.

4. Shri Kotwal, the learned Counsel appearing on behalf of the Appellant submitted that the sanction to prosecute was not granted by the appointing authority and, therefore, the order of sanction was illegal. He submitted that since the sanction was not properly accorded by the appointing authority, the entire prosecution is vitiated since the learned Judge does not have jurisdiction to try and decide the case for want of prosecution. He invited my attention to the evidence of PW-2 Shri Dilip Raghunath Borole and also the evidence adduced by the Defence Witness DW-2. He also invited my attention to the reasons given by the learned Special Judge. He has also invited my attention to the minutes of the meeting of the Board of Director of MTNL held on 21st June, 2005 and also the MTNL Conduct Discipline and Appeal Rules, 1998 as amended upto 10.5.2007. In support of the said submission, he has relied on two judgments of the Apex Court in the cases of

(1) R.S. Nayak v. A.R. Antulay 1984 2 Supreme Court Cases 183

(2) Mohd. Iqbal Ahmed v. State of Andhra Pradesh (1979) 4 Supreme Court Cases 172.

5. The learned Counsel appearing on behalf of the CBI, however, vehemently opposed the submission made by the learned Counsel for the Petitioner. He has submitted that the Trial Court has passed a reasoned order and accepted the evidence of PW-2. He submitted that the Executive Director was the sanctioning authority. He submitted that though the rules are amended subsequently, there is no material on record to show the date on which the said amendment came into effect. PW02, however, finally admitted that subsequently the disciplinary authority is the Director of Human Resources. He, however, submitted that the date from which the said amendment was brought into effect has not been brought on record.

6. I have heard both the learned Counsel at length. In my view, the sanction has not been accorded properly by the sanctioning authority and, therefore, on this ground alone the Appellant is liable to be acquitted and it is not necessary to go into evidence and other aspects of the case. The Appellant was admittedly working as the Divisional Engineer at the relevant time. The MTNL in Rule 38 clearly stipulates that the rules can be amended, modified or added from time to time by the Board and on such amendments, modifications or additions shall take effect from the date stated therein. The Defence Witness DW-2, who was examined by the prosecution has stated that he was working as Assistant General Manager (Legal). He has further stated that service conditions of MTNL servants are governed by MTNL Conduct Discipline and Appeal Rules 1998. He has stated that a regular officer appointed in the cadre of Divisional Engineer falls in the category of group s appointing and disciplinary authority will be the Director Human Resources. He has also stated that even in case of persons falling in Group 4 category then also his appointing and removing authority will be the same i.e. Director Human Resources. In the cross examination he has stated that the resolution to amend the relevant rules was passed in the meeting of the Board of Directors held in June, 2005 and before the amendment came into force, the Executive Directors of MTNL was the appointing and disciplinary authority for the officers falling under Group _ B_ Category.

7. On the other hand, the prosecution examined PW-5 Mahendarsingh Pitambersingh Rana, who is working as the Executive Director of MTNL, Mumbai who had passed an order dated 27.12.2005. Interestingly, this witness has not deposed or has not shown how he is the appointing authority, competent to accord sanction to prosecute the accused. In his cross examination he has stated that he has produced rules indicating that he was entitled to appoint and remove the officer below the rank of Divisional Engineers of MTNL. However, no such rule was produced by this witness. The Special Judge has observed that and has noted that the rules were amended and the Rule 32 prescribes that the board of directors has power to amend the said rules. He has also noted that the board of directors had resolved that for Category _ B_ , appointing authority should be Director, Human Resources, instead of Executive Director, in their meeting dated 21.6.2005. Sanction, admittedly was granted by the Executive Director on 27.12.2005. The learned Special Judge, however, has held that in the absence of satisfactory proof regarding implementation of the amended rule, it must be presumed that old rule, must have been in force, till the new rule was given effect to.

8. In my view, the reasoning given by the learned Special Judge is contrary to law. It is a settled position in law that it is the duty of the prosecution to prove its case beyond the reasonable doubt against the accused and this burden, therefore, cannot be shifted from the prosecution to the defence, inter alia, to initiate the prosecution against the accused. Initially this burden has to be discharged by the prosecution by obtaining the sanction from the competent authority and it has to be established that the authority which had accorded the

sanction, was competent to appoint or remove the delinquent officer. In the present case, there is sufficient material on record to indicate that the rules were amended in the meeting on 21.6.2005 and the Executive Director who granted sanction to prosecute the accused was no longer competent to give sanction. DW-2 also in his evidence has clearly stated that the Executive Director was no longer the appointing authority.

9. That being the position, in my view, the Special Judge has erred in holding that the Executive Director was the appointing authority and was competent to grant sanction to prosecute the accused. The material on record and evidence of DW-2 independently indicate that the director alone was the competent authority on the date on which the sanction was given to prosecute and as such, sanction given by the Executive Director, therefore, was patently illegal. The Apex Court in catena of cases has held that if valid sanction is not granted, the whole prosecution becomes invalid. Perusal of the said judgments clearly reveal that if the sanction is not validly granted, the entire trial is vitiated. The judgment in the case of R.S. Nayak (Supra) the Apex Court in paragraph 19 of has specifically held as under:

19. Section 6 bars the court from taking cognizance of the offences therein enumerated alleged to have been committed by a public servant except with the previous sanction of the competent authority empowered to grant the requisite sanction. Section 8 of 1952 Act prescribes procedure and powers of Special Judge empowered to try offence set out in Section 6 of 1947 Act. Construction of Section 8 has been a subject to vigorous debate in the cognate appeal. In this appeal we will proceed on the assumption that a Special Judge can take cognizance of offence he is competent to try on a private complaint. Section 6 creates a bar to the court from taking cognizance of offences therein enumerated except with the previous sanction of the authority set out in Clauses (a), (b) and (c) of Sub-section (1). The object underlying such provision was to save the public servant from the harassment of frivolous or unsubstantiated allegations. The policy underlying Section 6 and similar sections, is that there should not be unnecessary harassment of public servant. (see C.R. Bansi Vs. The State of Maharashtra,)Existence thus of a valid sanction is a prerequisite to the taking of cognizance of the enumerated offences alleged to have been committed by a public servant. The bar is to the taking of cognizance of offence by the court. Therefore, when the court is called upon to take cognizance of such offences, it must enquire whether there is a valid sanction to prosecute the public servant for the offence alleged to have been committed by him as public servant. Undoubtedly, the accused must be a public servant when he is alleged to have committed the offence of which he is accused because Sections 161, 164, 165 IPC and Section 5(2) of the 1947 Act clearly spell out that the offences therein defined can be committed by a public servant. If it is contemplated to prosecute public servant who has committed such offences, when the court is called upon to take cognizance of the offence, a sanction ought to be available otherwise the court would have no jurisdiction to take cognizance of the offence. A trial without

a valid sanction where one is necessary u/s 6 has been held to be a trial without jurisdiction by the court. (see R.R. Chari Vs. State of U.P., of U.P. And S.N. Bose Vs. State of Bihar, . In Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh, it was held that a trial without a sanction renders the proceedings ab initio void. But the terminus a quo for a valid sanction is the time when the court is called upon to take cognizance of the offence. It, therefore, when the offence is alleged to have been committed, the accused was a public servant but by the time the court is called upon to take cognizance of the offence committed by him as public servant, he has ceased to be a public servant, no sanction would be necessary for taking cognizance of the offence against him. This approach is in accord with the policy underlying Section 6 in that a public servant is not to be exposed to harassment of a frivolous or speculative prosecution. If he has ceased to be a public servant in the meantime, this vital consideration ceases to exist. As a necessary corollary, if the accused has ceased to be a public servant at the time when the court is called upon to take cognizance of the offence alleged to have been committed by him as public servant, Section 6 is not attracted. This aspect is no more res integra. In S.A. Venkataraman Vs. The State, this Court held as under:

In our opinion, in giving effect to the ordinary meaning of the words used in Section 6 of the Act, the conclusion is inevitable that at the time of court is asked to take cognizance not only the offence must have been committed by a public servant but the person accused is still a public servant removable from his office by a competent authority before the provisions of Section 6 can apply. In the present appeals, admittedly, the appellants had ceased to be public servants at the time the court took cognizance of the offences alleged to have been committed by them as public servants. Accordingly, the provisions of Section 6 of the Act did not apply and the prosecution against them was not vitiated by the lack of a previous sanction by a competent authority.

And this view has been consistently followed in C.R. Bansi case 2 and K.S. Dharmadatan Vs. Central Government and Others, .It therefore appears well-settled that the relevant date with reference to which a valid sanction is sine qua non for taking cognizance of an offence committed by a public servant as required by Section 6 is the date on which the court is called upon to take cognizance of the offence of which he is accused.

Similarly, in the case of Mohd. Iqbal Ahmed (supra), the Apex Court has held that in the absence of any valid sanction, the whole prosecution is vitiated.

10. Under these circumstances, therefore, in my view, the Trial Court has erred in holding that valid sanction was given by the Executive Director. In my view, therefore, since the valid sanction has not been granted by the Sanctioning Authority, the entire trial is vitiated and the Special Judge, therefore, did not have jurisdiction to try and decide the prosecution case against the accused. On this ground alone, the appeal will have to be allowed. Hence, the judgment and order passed by the Special Judge is quashed and set aside. The Appeal is

allowed. The Appellant is acquitted of the offence of which he is charged. His bail bond stands cancelled.