
(2015) 04 BOM CK 0239
In the Bombay High Court
Case No : Criminal Appeal No. 346 of 2005

Balkrishna Bhau Desai

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 23-04-2015

Acts Referred:

Constitution of India, 1950 — Article 154

Prevention of Corruption Act, 1988 — Section 13, 13(1)(d), 13(2), 19, 7

Citation : (2015) 4 BomCR(Cri) 78

Hon'ble Judges : A.M. Thipsay, J

Bench : Single Bench

Advocate : Shekhar Ingawale, for the Appellant; Deepak Thakre, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

A.M. Thipsay, J.

1. The appellant, who was, at the material time, working as a Sectional Engineer in the Public Works Department, Indapur, Sub-Division, Pune, was prosecuted on the allegation of having committed offences punishable under section 7 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act. The learned Special Judge, Baramati, after holding a trial, found the appellant guilty of the aforesaid offences and sentenced him to suffer Rigorous Imprisonment for one year and to pay a fine of Rs.2,000/-on each count, in default to suffer Simple Imprisonment for six months. Being aggrieved by the Judgment of conviction as delivered by the learned Special Judge, Baramati and the sentences imposed by him, the appellant has approached this Court by filing the present Appeal.

2. The prosecution case, as put forth before the trial Court, in brief, may be stated thus :

One Bharat Gulabrao Raje-Bhosale (PW 1), a Government Contractor, was given a contract in respect of the construction of a road. The estimated cost of the

work was Rs.24,00,000/-. Raje-Bhosale had paid a security deposit of Rs.48,000/-in the office of the Executive Engineer. Raje-Bhosale commenced the work in the month of February 1997 and was receiving payments from the PWD from time to time, and in a phase-wise manner. In the month of March 1997, Raje-Bhosale received a payment of Rs.5,00,000/-under the first bill. In the month of April 1997, the appellant and the Deputy Engineer one Rajole had demanded an amount of Rs.1,00,000/-from Raje-Bhosale by way of bribe. As Raje-Bhosale did not pay that amount to them, they started creating difficulties for Raje-Bhosale. Rajole stopped the supply of asphalt, and got the work delayed. Raje-Bhosale had to meet the Executive Engineer, and complaint about Rajole and Desai (appellant). It is only thereafter, that Raje-Bhosale could carry out further work. Again, when the next bill was collected, Rajole and the appellant again demanded a bribe of Rs.1,00,000/-from Raje-Bhosale and threatened that if he would not pay the amount, they would stop the asphalt supply. Raje-Bhosale completed the work by May 1998, and sent a letter to the Executive Engineer informing it. Raje-Bhosale has requested to pay his final bill. He met the Executive Engineer Shri Ashtapure, who, after inspection of the work, directed Rajole and the appellant to submit the final bill. The appellant prepared final bill, but it was incomplete. When Raje-Bhosale requested the appellant to prepare a final bill, he told Raje-Bhosale that Raje-Bhosale would have to pay 2% of the whole bill (i.e. Rs.24,00,000/-) to the appellant and another 2% of the whole bill to Rajole. (i.e. total Rs.84,000/-) Raje-Bhosale paid Rs.20,000/-to the appellant immediately. Appellant then prepared a bill for Rs.3,50,000/-, though actually the bill of Raje-Bhosale was for more than Rs.5,50,000/-. Raje-Bhosale then again met the Executive Engineer Shri Ashtapure, who asked Deputy Engineer Salokhe (who had come in place of Deputy Engineer Rajole) to prepare and submit final bill of Rs.2,00,000/-. Thereafter, there was discussion between the appellant and Raje-Bhosale and the appellant asked Raje-Bhosale to pay an amount of Rs.70,000/-, instead of Rs.84,000/-as previously demanded.

On 10th July 1998 at about 9.00 a.m to 9.30 a.m, Raje-Bhosale made a telephone call to the appellant at his residence and told him that he would be coming to the house of the appellant between 5.00 p.m to 6.00 p.m. The appellant then said that Raje-Bhosale should give Rs.50,000/-to him, when Raje-Bhosale told him that on that day, he would give about Rs.15,000/-to Rs.20,000/-and that, the remaining he would give after he would get the payment of the bill. The appellant agreed to this.

Raje-Bhosale then went to the office of the Anti Corruption Bureau, Pune at about 11.00 a.m to 12 noon. He had taken an amount of Rs.15,000/-with him. He met Satish Ahire (PW 4), Inspector in that department. About eight days before 10th July 1998, Raje-Bhosale had met Shri Mushrif, Superintendent of Police, and had apprised him of the illegal demands by the appellant. On 10th July 1998, the complaint of Raje-Bhosale was recorded. At about 2.00 pm to 2.30 pm, two panchas Ramchandra Jadhav (PW 3) and Santram Kamble were called in the office of ACB. Inspector read out the complaint lodged by Raje-

Bhosale to the panchas. Thereafter, a trap was laid. Anthracin powder was applied to the currency notes given by Raje-Bhosale and appropriate instructions were given to him, and to the panchas. As per the trap laid, the police party, the panchas and Raje-Bhosale went to Indapur and ultimately, when the appellant accepted the tainted amount of Rs.15,000/-in his office, he was apprehended.

3. In order to establish its case, the prosecution examined four witnesses during the trial. The first witness, as aforesaid, is Bharat Raje-Bhosale, the First Informant. The second witness Rashid Gafur Sayyed, Deputy Secretary (PWD) is the one who had signed the sanction order issued under section 19 of the Prevention of Corruption Act. (hereinafter "P C. Act" for brevity). The third witness Ramchandra Jadhav it may be recalled is a panch in respect of the pre-trap and post-trap panchnama, and the fourth witness Satish Ahire, Inspector of Police, is the trap laying officer.

4. The defence of the appellant was that he had been falsely implicated. According to him, he had never demanded any illegal gratification from Raje-Bhosale. The appellant examined Rajole, who, as aforesaid, was the Deputy Engineer at the material time, as a defence witness. The defence of the appellant is that there were a number of faults in the work carried out by Raje-Bhosale and that, Raje-Bhosale had, therefore, been warned by issuing a letter to him; and that, Raje-Bhosale therefore, had a grudge against the appellant.

5. I have heard Mr. Shekhar Ingawale, learned counsel for the appellant. I have heard Mr. Deepak Thakre, learned APP for the State. I have gone through the record of the case, and more particularly, the entire evidence adduced during the trial and the impugned judgment.

6. It is contended by the learned counsel for the appellant that the judgment and order of conviction, as recorded by the learned Special Judge, is not proper or legal. According to him, the charge, as was framed, was not proper. It is also submitted that the sanction to prosecute the appellant, as contemplated under section 19 of the P.C. Act, was also invalid. According to him, these factors have caused serious prejudice to the appellant, and the appellant was therefore, entitled to be acquitted. It is also submitted that even on an appreciation of the evidence, as was adduced during the trial, the finding of conviction could not have been arrived at. He submitted that the trap was laid without any verification of the alleged demand, and that, there was no satisfactory evidence of the demand. He submitted that even as regards the alleged acceptance of bribe, there was no satisfactory evidence. He contended that there were a number of discrepancies in the prosecution evidence, creating a serious doubt about the truth of the prosecution version, the benefit of which should have been given to the appellant, and he should have been acquitted.

7. I have carefully considered the matter.

8. So far as the charge is concerned, indeed the same does not appear to be properly or appropriately framed. The learned Judge has framed a composite

charge with respect to the offence punishable under section 7 and section 13 of the P.C. Act which was not proper. There is substance in the contention advanced by the learned counsel for the appellant that the ingredients of an offence punishable under section 7 of the P.C. Act, are not found in the charge that was framed against the appellant. Though this appears to be so, I am unable to hold that the error in framing of charge, or rather the lack of precision and accuracy while framing it, as has happened in this case, would vitiate the finding of conviction. It is not possible to hold that the appellant was misled by the framing of the charge, in any manner, or was not able to defend himself properly by that reason. In any case, it is not possible to hold that because of the propriety or lack of precision in framing of a charge, a failure of justice has been occasioned. I am therefore, not inclined to give importance to this aspect.

9. As regards sanction, the learned counsel for the appellant submitted that the sanction in this case was granted by PW 2 Rasheed Sayeed, who was, at the material time, working as Under Secretary in the Public Works Department, (PWD) Secretariat. It is contended that he was not competent to accord the sanction required under section 19 of the P C. Act, and that it was only the concerned Minister who could have granted such sanction. My attention was drawn to the evidence of this witness in which he agreed that in case of a public servant whose basic salary is Rs.10,650/-, proposal to grant sanction for prosecution would be required to be sent to the Dy. Chief Minister. That the applicant belongs to that category was not and is not in dispute. Rasheed Sayeed has stated that under Rule 13 of the Rules of Business framed by the Government, the powers to accord a sanction were delegated to him. This is obviously incorrect as the power granted to the Under Secretaries is only to authenticate the documents on behalf of the Government. Therefore, if this witness had granted the sanction, the same would have been bad in law. However, though this witness does say that it is he who has granted the sanction, on the face of the evidence and the sanction order, this claim of the witness is absolutely incorrect. It is apparent from the sanction order that he has merely authenticated the same in accordance with the Rules of Business, and that the order has actually been passed by and in the name of Governor of Maharashtra in whom the executive power of the State is vested by virtue of Article 154 of the Constitution. The evidence of this witness that " he perused the documents submitted to him, applied his mind and took a decision whether sanction should be granted or not ", is not only incorrect, but is ridiculous. The sanction order was produced before the Court during the trial, and no challenge to the validity thereof was raised, except that "the Under Secretary was not entitled to accord the sanction for prosecution". That the Under Secretary was not competent, has to be accepted, but the claim of the Under Secretary that "he had granted the sanction", cannot be accepted. Since actually the sanction appears to have been granted by the government, no importance can be given to the challenge to the validity of the sanction which is based purely on a wrong, erroneous and rather ridiculous statement made by PW No. 2 Rasheed Sayed.

Since there is nothing to show that the sanction had not been granted in accordance with the Rules of Business, no fault can be found therewith. As such, this contention which was rightly not stretched much does not assist the appellant, in any manner.

10. In view of the contention that the alleged demand of illegal gratification was not proved at all, it would be necessary to examine the evidence of Raje-Bhosale in that regard, carefully. It is because except Raje-Bhosale, there is no other witness who can state about any such demand.

11. According to Raje-Bhosale, due to the harassment caused to the appellant and Rajole, and in order that they should not create any difficulties for him in completing the work, he had paid an amount of Rs.20,000/-to the appellant, already. After completion of further work, and when Raje-Bhosale was to get a further amount, the appellant wanted further illegal gratification from him, and had initially demanded an amount of Rs.84,000/-from Raje-Bhosale. It is in this background that on 10th July 1998, at about 9.00 a.m to 9.30 a.m, Raje-Bhosale made a telephone call to the appellant at his residence, and told him that he would be coming to the house of the appellant between 5.00 p.m to 6.00 p.m for giving money to him. The appellant, according to Raje-Bhosale, said that he should be given Rs.50,000/-, but Raje-Bhosale told him that, on that day, he would give about Rs.15,000/-to Rs.20,000/-only, and that the remaining amount would be given after getting the payment of the bill. According to Raje-Bhosale, the appellant agreed to accept the said amount of Rs.15,000/-to Rs.20,000/-.

12. Raje-Bhosale then went to the office of the Anti Corruption Bureau (ACB) at Pune at about 11 to 12 noon on the same day. Interestingly, he had already taken an amount of Rs.15,000/-with him. He then made his complaint to the Inspector in the office of the ACB. After the complaint was lodged at about 2.00 to 2.30 p.m, the Investigating Officer Ahire immediately laid a trap without attempting to make any verification of the alleged demand. Raje-Bhosale was even not needed to be told about bringing the amount which would be offered to the appellant as bribe money, as Raje-Bhosale had already carried that amount with him. This is rather remarkable inasmuch as, ordinarily, the complainant acts after instructions, in that regard, are given to him by the Investigating Agency. Normally, a person does not already carry cash with him which is to be used for trapping the corrupt public servant. In this context, it is revealed in the evidence of Raje-Bhosale that he had already met the Superintendent of Police, about a week prior to 10th July 1992. Raje-Bhosale did not mention this in the complaint. Anyway, not much turns on this, except that it should be clearly understood that Raje-Bhosale had already carried the amount which was to be used for trapping the appellant with him when he went to the ACB office for lodging the complaint. Indeed, it appears that there was no verification of the statement allegedly made by the appellant, and the Investigating Officer did not make any attempt to do so.

13. There is a discrepancy as to what was the denomination of the currency notes that comprise the amount of Rs.15,000/-. According to Raje-Bhosale, the

amount consisted of 150 currency notes of Rs.100 denomination. However, according to the Investigating Officer and the panch and as per the prosecution case, the amount consisted of 100 currency notes of Rs.100, and another 100 of Rs.50 denomination. This discrepancy needed to be taken into consideration along with other weaknesses in the prosecution case, but it did not impress the learned trial Judge who termed it as a minor discrepancy.

14. Even if this discrepancy would not be crucial or fatal, there is a serious infirmity in the prosecution case which could not have been lightly ignored. Now, according to Raje-Bhosale, he was given a tape-recorder by the Investigating Officer for recording the conversation that would take place between him and the appellant. Raje-Bhosale categorically states that one small tape-recorder was given to him, and he was instructed to record the conversation between him. This was quite natural, as there had been no prior verification of the alleged demand. Recording of the conversation would support the theory of the initial demand, or atleast the demand just before the acceptance. It would corroborate the testimony of Raje-Bhosale in that regard. Interestingly, however, it is not the prosecution case that any tape-recorder was given to Raje-Bhosale. The Investigating Officer Ahire (PW 4) not only did not speak about any tape-recorder being given to Raje-Bhosale for recording the conversation between him and the appellant, but categorically denied that any tape-recorder had been given to Raje-Bhosale by him. Interestingly, he did admit that in this case, he was aware of the possibility and desirability of having the conversation between the appellant and Raje-Bhosale, recorded. The panch Ramchandra Jadhav (PW 3) also does not speak about any tape-recorder being given to Raje-Bhosale for recording the conversation between him and the appellant.

15. I have carefully considered this aspect.

16. It is not possible to hold that Raje-Bhosale had made an accidental slip while speaking about he having been given a tape-recorder. It is because the story of his having been given a tape-recorder, is not found only on a bare assertion to that effect, but Raje-Bhosale has given the details of further happenings, categorically stating that he did actually record the conversation. According to Raje-Bhosale, after the appellant was trapped, the Investigating Officer took the tape-recorder from Raje-Bhosale. He has said this in his examination-in-chief itself. In the cross-examination, he said that after the accused was trapped, he had given the tape-recorder to the Investigating Officer, and that, the cassette in the tape-recorder was played in the presence of panchas after the trap. Thus, Raje-Bhosale is categorical and clear about the fact of a tape-recorder having been given to him, the conversation between him and the appellant being recorded, the same having been played over to the Investigating Officer and the panchas after the trap, and of the cassette being handed over to the Investigating Officer.

17. The question that arises is why then the prosecution does not wish to rely on the conversation that had taken place between Raje-Bhosale and the appellant?

The question that arises is why the Investigating Officer is claiming that no tape-recorder had been provided to Raje-Bhosale (while admitting that it could be provided), and no conversation between him and the appellant had been recorded? The question that arises is who is right Raje-Bhosale or the Investigating Officer Ahire (PW 4)? It is a matter of common sense that Raje-Bhosale's version in this regard, cannot be discarded at all. If there had been no tape-recorder, Raje-Bhosale would have had no reason to mention about such a tape-recorder. Moreover, ordinarily, the Investigating Officer was expected to have the conversation between Raje-Bhosale and the appellant recorded when such recording facility was available, and when there had been no prior verification of the alleged demand.

18. In my opinion, this is a serious discrepancy in the prosecution case. This shows that the prosecution did not want to produce the record of the conversation between Raje-Bhosale and the appellant. Needless to say that in such a situation, the inference that the recorded conversation, if produced, would not have supported the prosecution case, or the account of the happenings as given by the de facto complainant Raje-Bhosale, can legitimately be drawn.

19. This aspect also did not impress the learned Special Judge. He did notice and accept that there was a clear discrepancy in that regard. He noted the submission of the appellant that the prosecution had deliberately suppressed the audio cassette with a malafide intention. He also noted that the evidence of Raje-Bhosale and Investigating Officer Ahire (PW 4) contradicted the evidence of each other in this regard. However, he did not feel this important at all. He observed :

"It is very pertinent to note that there is nothing on record to show that any conversation was recorded in the said cassette. It is quite possible that due to some mechanical defect, or if the parties are talking in a considerable low voice, a conversation is not recorded. It is a matter of demand of bribe and its payment and can one expect that the accused and the complainant would be speaking loudly so that the neighbors should hear the same"

20. It is not possible to accept the reasoning of the learned trial Judge. He forgot that it was not the case of the prosecution "that the record could not be produced because the conversation could not be recorded", or that "the conversation being in a low voice, was not audible". It may be recalled that the Investigating Officer had categorically denied that any tape-recorder was used, and any conversation between the appellant and Raje-Bhosale was tape-recorded. If the learned Judge could observe that due to mechanical defect, "sometimes a conversation would not be recorded", or "if the parties would be talking in a low voice, conversation would not be audible", why could the Investigating Officer not say that "the conversation had not been recorded due to some mechanical defect", or "as the parties were talking in a low voice, it was not audible", as the case may be. This question, however, did not bother the learned Special Judge. The significance of the attempt by the Investigating Officer of suppressing that tape-recorder was provided, and conversation had

been recorded, was not grasped by the learned Special Judge who has resorted to a somewhat perverse reasoning. In the pursuit of this reasoning, he forgot the evidence of Raje-Bhosale who claimed that the conversation had not only been recorded, but was also heard by the Investigating Officer and the panchas after the appellant had been trapped. Ignoring this evidence, the learned Judge considered two possibilities without any basis, and without anybody even suggesting it viz. that the conversation might not have been recorded due to some mechanical defect, or that it would not be audible because of it having taken place in a low voice. He, however, ignored a third possibility i.e. of the Investigating Officer making a false claim of not recording a conversation because the conversation did not support the version of Raje-Bhosale, or the theory of the appellant having made a demand of bribe. Why and how this possibility was ruled out, is impossible to understand. The only reason behind ruling out this possibility seems to be that this possibility is not consistent with the guilt of the accused.

21. Even if the discrepancy with respect to the denomination of the counterfeit currency notes to which Anthracin powder was applied, and which was used for trapping the appellant, was not felt material, the discrepancy about whether recording of the conversation between the appellant and Raje-Bhosale had been done, the evidence that it had been done and a feeble attempt to show that it was not done at all, just to avoid the production of the record, affect the prosecution case severely.

22. There are also some other discrepancies in the prosecution case. According to Raje-Bhosale, on going to Indapur, he and two panchas first were asked to go to the house of the appellant by the Investigating Officer. That, they went to the house of the appellant who was not present there, and his wife who was there, told that the appellant was in his office. Raje-Bhosale has then corrected this version and said that actually they did not go to the residence of the accused, but had sent a peon to the residence of the accused, and that the peon brought the information that the accused was in the office. The version of the panch Ramchandra Jadhav (PW 3) is however, different. According to him, Raje-Bhosale and he had indeed gone to the house of appellant, and that somebody from his house told that the appellant was in the office. Thereafter, the matter was reported by Raje-Bhosale and Jadhav to the I.O Ahire (PW 4), who then said that they should go to the office of the appellant. According to Ahire also, first Raje-Bhosale and the panch went to the residential quarters of the appellant, and since he was not there, and was said to be in the office, they went to the office. This discrepancy is indeed not very significant, but what needs to be kept in mind is that though according to Raje-Bhosale, the place of meeting was to be the residence of the appellant, actually the appellant did not wait there for Raje-Bhosale.

23. Investigating Officer - Ahire (PW 4) had asked Raje-Bhosale to keep the panch witness with him, and initiate the conversation with the appellant in the

presence of the panch. However, Raje-Bhosale himself actually asked the panch to wait outside only. Therefore, what exactly transpired when Raje-Bhosale met the appellant in his office, is not at all clear.

24. The evidence indicates that there had been some objections about the work carried out by Raje-Bhosale. Rajole (DW 1) stated in his evidence that Raje-Bhosale was slow in his work that there were some short-comings in the work carried out by him. In his evidence, Raje-Bhosale had made an attempt to suppress the fact he had received a warning for the short-comings.

25. Undoubtedly, there is evidence showing that the tainted amount was handled by the appellant inasmuch as the tips of the fingers of the appellant were said to be showing blue shining when seen under the ultra-violet rays. This would indicate that the appellant had handled the tainted amount. However, when the demand of illegal gratification itself has not been satisfactorily proved, and when the conversation between the appellant and Raje-Bhosale just before the tainted amount was allegedly passed over to the appellant, has been suppressed, it would not be possible to hold the appellant guilty only on the basis of evidence that he had handled the tainted amount. It is settled legal position that unless the evidence of the demand is satisfactory, the evidence obtained by laying a trap is required to be viewed cautiously. It would be necessary for the prosecution in such cases to prove that it was as a result of "demand" that the money was passed on. In this case, the evidence of the acceptance of the money by itself, is not sufficient to raise the inference about there having had a previous demand of illegal gratification.

26. After considering the entire evidence adduced before the trial court, I am of the opinion that this was a case where the prosecution had failed to prove the charges against the appellant. In my opinion, the following factors :

(i) That the complainant while going to the office of the ACB for lodging the complaint, had already carried the amount of bribe which was to be used for trapping the appellant;

(ii) That, the defacto complainant, had before going to the office of the ACB met the Superintendent of Police, but what transpired during that meeting, was not disclosed by Raje-Bhosale. Instead, he attempted to show as if the whole matter started on 10th July 1998 i.e. the day on which he went to the ACB office;

(iii) That, the trap was laid without verification, or even making an attempt to verify the alleged demand of bribe;

(iv) That, according to Raje-Bhosale, a tape-recorder was provided to him and the conversation between him and the appellant was recorded, and that the recorded conversation was after the trap played over by the Investigating officer, the panchas and Raje-Bhosale. The Investigating Officer, however, categorically denies that any tape-recorder was used, or any conversation had been recorded. Interestingly, he does not explain why it was not recorded, though such a facility

was available, and though, he, on his own saying, was aware of the fact that usually in such cases, the conversation is recorded;

(v) There is a discrepancy in the denomination of the notes consisting the amount of Rs.15,000/-,

collectively, (and the factor regarding the discrepancy about recording of the conversation singly and by itself), are sufficient to create a reasonable doubt about the truth of the prosecution version.

27. The appreciation of evidence as done by the learned Special Judge, and the conclusion arrived at by him, is not in accordance with law. This was a case where the appellant ought to have been acquitted.

28. Appeal is allowed.

29. The impugned judgment and order is set aside.

30. The appellant stands acquitted.

31. His bail bonds are discharged.

32. Fine, if paid, be refunded to him.