(2010) 11 BOM CK 0045

In the Bombay High Court

Case No : Criminal Appeal No. 449 of 2009

Bhaskar Maruti Thube and Anant Chandrakant Sonavane APPELLANT

Vs

The State of Maharashtra RESPONDENT

Date of Decision : 30-11-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 34, 409, 465, 467, 468
Prevention of Corruption Act, 1947 — Section 5(1), 5(2), 6

Citation : (2010) 11 BOM CK 0045

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

Bench : Single Bench

Advocate : S.R. Chitnis, instructed by Abhaykumar Apte, for the Appellant; M.R. Tidake, APP for the State, for the Respondent

Judgement

V.M. Kanade, J.—The Appellants are the Original Accused Nos. 2 and 3. They are challenging the judgment and order passed by the Special Court, Khed, Dist. Ratnagiri in Special Case No. 4 of 2003. By the said judgment and order, the Special Court, Khed was pleased to convict the Appellants for the offence punishable u/s 409 read with 34 of the Indian Penal Code, 467 read with 34 of the Indian Penal Code, 468 read with 34 of the Indian Penal Code, 465 and 471 read with 34 of the Indian Penal Code, 465 and 471 read with 34 of the Indian Penal Code and u/s 5(1)(c) and 5(1) (d) both punishable u/s 5(2) of the Prevention of Corruption Act, 1947 and sentenced to suffer R.I. for six months and to pay a fine of Rs. 300/-and in default of payment of fine to further undergo S.I. for 8 days. The sentences were directed to run concurrently.

2. A complaint was filed by one Kamalakar Sawant, in which he has stated that he had conducted an enquiry in respect of the work of plantation done at Ghera Sumargad. In the said area 50 and 40 hectors area the work of plantation was done in the years 1985-86 and 1986-87. This work was done by appointing local persons for doing labour work. A muster was maintained and this work was assigned to the Forest guard and the Range Officer and others were supposed to

supervise the said work. After entries were made, they were counter checked by the Forest Officer and Forest Guard and payments were accordingly made to the persons who had undertaken the plantation work. According to him, this work was assigned to the accused. According to him the amount mentioned in the said muster role was in fact, was not paid to the persons, who done the manual work but was misappropriated was Rs. 10,732.50 Ps. According to the Complainant, the accused prepared forged documents in order to get sanction and false endorsements were also made and an amount was misappropriated without disbursing the amount to these persons by forging thumb marks and signatures.

3. On the complaint filed by the complainant-Kamalakar Sawant, an offence vide Crime No. 161 of 1991 was registered against the accused persons registered at Khed Police Station. Statements of the witnesses were recorded and specimen thumb impression and signature also were obtained. Application was made seeking sanction for the prosecution against the accused. Accordingly, sanction was granted. Charge was framed against the accused. The prosecution in all examined 32 witnesses.

4. Shri Chitnis, the learned Senior Counsel appearing on behalf of the Appellants submitted that the sanctioning authority had not established that it had the authority to grant sanction and that no documents were produced for the purpose of showing that he had the authority to pass the order of sanction He submitted that burden of establishing this fact, was on the prosecution and it could not be shifted to the accused. Secondly, it was submitted that there was no material on record to indicate that the sanctioning authority had applied its mind while granting sanction to the prosecution. He submitted that the gist of offence was not even referred to in the order of sanction. No reference was made to the scheme which was introduced during the relevant period for the plantation programme. The role of the each accused was also not mentioned. He submitted that, therefore, the order of sanction was liable to be set aside. In support of the said submissions, he relied on the judgment of the Apex Court in the case of Mansukhlal Vithaldas Chauhan Vs. State of Gujarat, . He also submitted that in fact, PW-1 Vinayak Shivalkar in his cross examination has admitted that the Appellants had surrendered the unexpended amount of the year 1985-86 and 1986-87. He submitted that there was no recovery to indicate that this fact was taken into consideration by the sanctioning authority. He invited my attention to the evidence given by the sanctioning authority viz. PW-30 Shri Ambadas Vaitla. He submitted that the sanctioning authority had not produced any document to show that he had authority to grant sanction. He submitted that there was nothing in his evidence to indicate that there was any application of mind on part of the sanctioning authority and on the other hand, from his evidence it could be seen that he had accepted the papers sent by the ACP, Ratnagiri and had granted permission/sanction for prosecution. He also invited my attention to the order of sanction and pointed out various infirmities in the said order.

5. The learned APP for the State, on the other hand, has vehemently opposed

the submissions made by the learned Counsel for the Appellants. She submitted that the Appellants had committed a grievous offence of misappropriating the funds which were to be paid to the people who had actually done the work. She submitted that false muster role was prepared and this fact was established by the prosecution.

6. After having heard by both the counsel at length and after having gone through the judgment and order of the Trial court and the evidence of record, I am of the view that there is much substance in the submissions made by the learned Senior Counsel for the Appellants. The Apex Court has in several cases explained the importance of granting sanction. In the case of Mansukhlal Vithaldas Chauhan (Supra), the Apex Court has taken into consideration the various judgments of the Apex Court and the Privy Counsel on this point. The Apex Court in paragraphs 15 to 19 has observed as under:

15. In Gokulchand Dwarkadas Morarka v. King AIR 1948 SC it was pointed out that:

....The sanction to prosecute is an important matter; it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. They are not, as the High Court seem to have thought, concerned merely to see that the evidence discloses a prima facie case against the person sought to be prosecuted. They can refuse sanction on any ground which commends itself to them, for example, that on political or economic grounds they regard a prosecution as inexpedient. Looked at as a matter of substance it is plain that the Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case.

(Emphasis supplied)

16. In AIR 1945 16 (Federal Court) it was pointed out that sanction under the Act is not intended to be, nor is an automatic formality and it is essential that the provisions in regard to sanction should be observed with complete strictness. This Court in State Through Anti-Corruption Bureau, Government of Maharashtra, bombay Vs. Krishanchand Khushalchand Jagtiani, while considering the provisions of Section 6 of the Act held that one of the guiding principles for sanctioning authority would be the public interest and, therefore, the protection available u/s 6 cannot be said to be absolute. 17. Sanction lifts the bar for prosecution. The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to government servants against frivolous prosecutions. (See Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh,) Sanction is a weapon to ensure discouragement of frivolous and vexatious prosecution and is a safeguard for the innocent but not a shield for the guilty.

18. The validity of the sanction would, therefore, depend upon the material placed before the sanctioning authority and the fact that all the relevant facts,

material and evidence have been considered by the sanctioning authority. Consideration implies application of mind. The order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material placed before it. This fact can also be established by extrinsic evidence by placing the relevant files before the Court to show that all relevant facts were considered by the sanctioning authority. (See also Jaswant Singh Vs. The State of Punjab, and State of Bihar v. P.P. Sharma 1992 Supp (1) SCC 222 : 1992 SCC 192 : 1991Cri L.J. 1438).

19. Since the validity of "sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, if necessarily follows that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it to take a decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. If it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution.

Keeping in view the aforesaid principles laid down by the Apex Court, it has to be seen whether the sanction granted by the sanctioning authority is a valid sanction or not. Firstly, PW-30 in his evidence has stated as under. It would be appropriate if the same can be reproduced as word wise since it was only in paragraph 3.

3. It is not true that only Secretary can appoint Range forest officers. I have not produced any document on record to show that I am authorised to appoint and dismiss range forest officers (Witness volunteers that Maharashtra Govt. Rules of Business pa-General Administrate Department permit him to appoint and dismiss employees of Revenue and Forest Department.)

Perusal of the said evidence indicates that there was no application of mind on the part of the sanctioning authority in granting sanction. PW-1 Vinayak Shivalkar in his cross examination has stated as under:

9. Accused No. 1 was working as R.F.O. Khend in the year 1985/86. He made report to Chiplun office regarding the amounts which cannot be expended on various heads. Accused Nos. 1 and 2 have made reports from time to time to sub-division office regarding surrendering the grants for respective heads. Accused No. 1 has surrendered total grant of Rs. 24,314 and 1,09,250/-to sub-division office in the year 1985-86. Accused No. 2 has surrendered grant of Rs. 35,091/-

in the year 1987/88. It is compulsory for every R.F.O. to close cash book in his office on 20th of every month and submit report thereof to sub-division office on or before 22nd, otherwise a memo is issued to him. The R.F.O. is also questioned for not incurring the grant and surrendering it. I have no personal knowledge about allegations in this case.

From the said admission made in paragraph 9, it can be seen that accused No. 1 had surrendered total grant of Rs. 24,314 and 1,09,250/-to sub-division office in the year 1985-86. Accused No. 2 had surrendered grant of Rs. 35,091/-in the year 1987-88. There is no reference in the order of sanction to the consideration of the said fact while granting sanction to the consideration of the said fact while granting sanction to prosecute the Appellants-Accused which allegedly misappropriated was to the tune of Rs. 12,000/-approx. In his deposition, the sanctioning authority does not mention the role played by each of the accused, though in each and every cases of the accused it may not be necessary to mention the details of the case verbally, there must be some evidence to show that there has been application of mind while granting sanction. From the evidence of PW-30, it evident that as soon as ACP-Ratnagiri sent the papers to him, he granted sanction. Apart from that he has stated in paragraph 1 of his examination-in-chief that he was working as Joint Secretary for Revenue and Forest Department of Government of Maharashtra and that he was appointed and authorized to dismiss the Range Forest Officer working under Revenue and Forest Department. He has not produced any document to show that the Joint Secretary was authorized to appoint and dismiss the Range Forest Officer. The authority to grant sanction, therefore, is not produced by the prosecution. The order of sanction also suffers from various infirmities. It does not mention the exact role of the accused in the present case while granting sanction. Taking over all view of the matter, I am of the view that the prosecution has not established that valid sanction was granted by the sanctioning authority to prosecute the accused. The Special Court also has considered this aspect in perfunctory manner. In paragraph 59 of the impugned judgment, the Learned Special Judge has summed up the issue as under:

Certainly for the prosecution of a accused persons under Prevention of Corruption Act, sanction from the sanctioning authority is necessary. So far as the sanction to prosecute accused Nos. 1 and 2 is concerned, the prosecution has adduced the evidence of P.W. No. 30 Ambadas Vaitla. He has accorded sanction as per sanction order at exh.169. If evidence of this P.W. No. 30 is perused and at the same time the sanction order at exh.169 is perused then it goes to show that he had gone through the papers minutely and by applying his mind he accorded sanction for the prosecution of accused Nos. 1 and 2. He was cross examined by advocate Shri Bendke for the accused. But nothing incriminating has been come on record so as to disbelieve his evidence. Hence I am of the opinion that the sanction accorded by Ambadas Vaitla to prosecute accused Nos. 1 and 2 is proper legal and valid. Hence point No. 7 is answered in affirmative.

In my view, therefore, the Special Court also has erred in recording the said finding. In the result, once it is held that the sanction is not properly granted, the entire prosecution must fail. This view has been followed by the Apex Court in several judgments. The Apex Court in the case of Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh, has observed that if the order of sanction is invalid, the entire prosecution has failed. In paragraph 3, the Apex Court has observed as under:

It is incumbent on the prosecution to prove that a valid sanction has been granted by the Sanctioning Authority after it was satisfied that a case for sanction has been made out constituting the offence. This should be done in two ways; either (1) by producing the original sanction which itself contains the facts constituting the offence and the grounds of satisfaction and (2) by adducing evidence aliunde to show that the facts placed before the Sanctioning Authority and the satisfaction arrived by it. It is will settled that any case instituted without a proper sanction must fail because this being a manifest difficult in the prosecution the entire proceedings are rendered void ab initio.

In the present case, therefore, since prosecution has not established that valid sanction was granted, the entire prosecution was failed and, therefore, in my view, it is not necessary to referred other evidence which is brought on record by the prosecution. The same view has been taken by the Apex Court in the R.S. Nayak Vs. A.R. Antulay, .

7. The judgment and order, therefore, passed by the Trial Court is liable to be set aside. The appeal is allowed. The Appellants are acquitted for the offences of which they are charged. The Appellants are on bail, their bail bonds shall stand cancelled. Appeal is, accordingly, disposed of in the aforesaid terms.