

(1994) 10 BOM CK 0011

In the Bombay High Court

Case No : Criminal Appeal No. 1139 of 1980

Bhujangrao Kulkarni and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 12-10-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 197
Penal Code, 1860 (IPC) — Section 120B, 21, 420, 467
Prevention of Corruption Act, 1947 — Section 5(1), 5(2), 6
Special Courts Act, 1979 — Section 3, 5, 6

Citation : (1995) 3 BomCR 65 : (1995) 97 BOMLR 194

Hon'ble Judges : S.C. Malte, J

Bench : Single Bench

Advocate : Sanjay D. Thokade, for the Appellant; Y.V. Patil, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

S.C. Malte, J.—These appellants/accused have preferred this appeal against their conviction under various sections. Initially, in all four accused were being prosecuted for offences punishable under sections 420, 467, 468, 120B, all read with section 34 of the Indian Penal Code, and also u/s 5(1)(c) and section 5(1)(b) read with section 5(2) of the Prevention of Corruption Act, 1947. The accused were tried before the Special Judge, Solapur, who was appointed as Special Judge under the provisions of the Prevention of Corruption Act. The learned Judge acquitted accused No. 1. The trial Judge, however, convicted accused No. 2 (appellant No. 1) for offence u/s 409 of the I.P.C. and sentenced him to suffer R.I. for two years and fine of Rs. 5,000/-, in default R.I. for one year. He was also convicted u/s 477A read with section 109 I.P.C. and was sentenced to suffer R.I. for one year and fine of Rs. 500/- in default R.I. for three months. The appellant No. 1 (accused No. 2) was further convicted u/s 5(2) read with section 5(1)(c) and 5(1)(d) of the Prevention of Corruption Act, 1947 and was sentenced to suffer R.I. for one year and fine of Rs. 500/- in default R.I. for three months.

The appellant Nos. 2 and 3 (original accused Nos. 3 & 4) were convicted u/s 408 of I.P.C. and were sentenced to suffer R.I. for two years and to pay fine of Rs. 5,000/- each, in default to suffer R.I. for one year. Appellant Nos. 2 and 3 were also convicted u/s 477A I.P.C. and were sentenced to suffer R.I. for one year and to pay fine of Rs. 500/- each, in default R.I. for three months. Against that conviction and sentence, this appeal has been preferred by these accused.

2. It is not necessary to go into the details of the allegations made against these accused. The matter, in this case, can be disposed of on technical point regarding jurisdiction. The Advocate for the appellants submitted before me that none of these accused were public servants, and the provisions of Prevention of Corruption Act, 1947 were not at all attracted. It was, therefore, contended that the Special Judge appointed under the provisions of the said Act, had, as such, no jurisdiction to try the case. Section 5 of the Prevention of Corruption Act, 1947 which was then applicable to the case, prescribes punishment in respect of criminal misconduct committed by a public servant. As per the Act, (Amending Act, 1988), section 6, a Special Judge is required to be appointed by the State for a particular area for holding the trial of the cases falling u/s 5 of the Prevention of Corruption Act and the offences punishable under sections 161, 162, 163, 164, 165 or 165A of the I.P.C. The conspiracy to commit such offences also are covered by that section. It is, thus, obvious that if the public servant commits criminal misconduct, the case is entrusted for trial to a Special Judge constituted under the said Act. Obviously, therefore, that is a creation of special jurisdiction of the Judge to try such cases. It was, therefore, contended before me that if none of the accused belonged to category of public servant as is understood under the said Act, the jurisdiction exercised by the Special Judge in holding the trial and convicting the accused, was without jurisdiction and deserves to be quashed and set aside. In support of that proposition, my attention was invited to the case reported in Hanmant Janardhan Patil Vs. The State of Maharashtra, . In that case, a Single Bench of this Court was considering the similar case in which office bearers of the Co-operative Society, were facing prosecution under the provisions of the Prevention of Corruption Act. His Lordship addressed questions raised before him. These, briefly, stated were :

(a) Whether the appellants who were admittedly office bearers of a Co-operative Society during the relevant period, can be categorised as public servants within the meaning of section 161 of the Maharashtra Co-operative Societies Act read with section 21 of the Indian Penal Code?

(b) Whether it was essential for the prosecuting authorities to obtain prior sanction to prosecute the accused in their capacity as public servants for offences under the Prevention of Corruption Act, as also u/s 409 of the I.P.C.; whereby the requirement of prior sanction u/s 6 of the Prevention of Corruption Act and section 197 of Cr.P.C. respectively prescribes a bar to a Court taking cognizance of the offences except with prior sanction of the competent authority?

c) xxxxxx

(d) Whether it can be held that the jurisdiction exercised by the learned Special Judge who was presiding over the Special Court was a valid jurisdiction in respect of the remainder of the charges?

The other points referred to by His Lordship presently is not necessary in the present case.

3. Section 161 of the Co-operative Societies Act provides that the Registrar and the other officers shall be public servants within the meaning of section 21 of I.P.C. The list given under that section includes an Administrator of the society, who was in this case accused No. 1 (acquitted by the trial Court); accused No. 2 was the Manager of the said society, accused No. 3 (since deceased) was the cashier, and accused No. 4 was a clerk in the said society wherein the misappropriation of the amount had taken place by adopting certain modus operandi. The question was as to whether these persons can be called as public servants. In the above mentioned reported case, His Lordship took into consideration the provisions of section 161 of the Maharashtra Co-operative Societies Act and also the definition of section 2(20) of the said Act in order to ascertain whether these persons can be considered as public servants for the purposed of prosecution under the provisions of the Prevention of Corruption Act, and in the circumstances, under the I.P.C. His Lordship arrived at the conclusion that they were not public servants for the purpose of these provisions. I respectfully agree with the said ruling.

4. In this case, it may be mentioned that there is a Barshi Taluka Co-operative Sale and Purchase Society Ltd. in which misappropriation of the amount had taken place by committing criminal breach of trust. The accused No. 1 was Administrator appointed by the Registrar of the Co-operative Societies. The sanction order (Exh. 27) issued while prosecuting the said Administrator, shows that it was signed by the Chairman of the Bank. In the said sanction order, it is clearly stated that the said accused No. 1 Hansajirao Bajirao Saluke was a person appointed by the Chairman of the Solapur District Central Co-operative Bank Ltd. In other words, he was an employee of the Co-operative Bank and not of the State. Since he is an office holder of a Co-operative Bank, he cannot be said to be a public servant. The said aspect, however, escaped the attention when the matter was before the trial Judge. Moreover, as the position of law was then understood, it clearly appears that the prosecution proceeded on the basis that the said Administrator was a public servant within the meaning of section 161 of the Maharashtra Co-operative Societies Act. The judgment of the trial Court indicates that elaborate argument was advanced to support that the sanction to prosecute the accused No. 1 was legal and proper. It clearly therefore appears that the matter had proceeded on this basis that the said administrator was a public servant. Now in view of the interpretation put up by His Lordship in the above ruling, it is quite clear that the said person is not a public servant in as much as he was an employee of the Co-operative Society. The other three accused were, admittedly, employees of the Co-operative Society". In other

words, none of these four accused who had initially faced trial in the trial Court were public servants. Obviously, therefore, these persons could not have been prosecuted and tried for offences under the provisions of the Prevention of Corruption Act, 1947. The inevitable position was that the Special Judge appointed under that Act, would not have jurisdiction to try the case.

5. The question then, however, remains as to what would be the position once it was found that the trial Court exercised the powers without jurisdiction. In this case. It was submitted that on behalf of the accused that the matter should not be sent back for de novo trial, as was ordered by the learned Judge in the above mentioned reported case. It was submitted that the accused No. 2 (appellant No. 1) is now in advance age of about 60 years, accused No. 3 (appellant No. 2) already passed away; and accused No. 4 (appellant No. 3) is already in advance age. It was, therefore, submitted that no useful purpose would be achieved by sending back the matter. It was further submitted that on merits if this Court comes to the conclusion that no offences against any of the accused could have been spelt out, the end of justice would be better served by acquitting the accused at this stage. With respect, I am unable to agree with this submission. Mere passage of time in such cases, would not entitle to the accused to have compassion. The charge indicates that huge amount of Rs. 1,39,186.78 was misappropriated. It was quite substantial amount. I further find that the trial Court has come to the conclusion that the amount in question had been entrusted to these accused. Accused No. 1 came to be acquitted simply because the order to sanction the prosecution was not found to be proper. The trial Court has also held that by adopting certain modus operandi, the amount had passed in the hands of the accused. He has also referred to a voucher of Rs. 61,000/- in the name of the accused No. 1. On considering all these aspects I feel that the matter should be send to the trial Court for de novo trial right from the stage of framing the charge. In the above mentioned reported case also, His Lordship has directed de novo trial. I, therefore, pass the following order :

Appeal is allowed. The conviction and sentence passed by the Special Judge, Solapur, is hereby quashed and set aside and matter is hereby sent to the Court of Judicial Magistrate, First Class, Barshi, District-Solapur for de novo trial in view of the observations made above. The trial Court is directed to frame a fresh charge and record evidence and dispose of the case according to law. The appellants are directed to appear before the trial Court at Barshi, District-Solapur on 12-12-1994. As far as possible the trial Court shall dispose of the case within six months from the date of receipt of the record and proceedings.