(2015) 09 BOM CK 0167

In the Bombay High Court

Case No : Criminal Appeal No. 42 of 2003

Central Bureau of Investigation — APPELLANT

Vs

Pradeep Bhagwanrao Kulkarni — RESPONDENT

Date of Decision : 07-09-2015

Acts Referred:

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

Citation : (2015) 09 BOM CK 0167

Hon'ble Judges : M.T. Joshi, J.

Bench : Single Bench

Advocate : Alok Sharma, Assistant Solicitor General, for the Appellant; Joydeep Chatterji, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

M.T. Joshi, J.—Heard both sides.

2. The present respondent was acquitted by the learned Special Judge (Under Prevention of Corruption Act) and Additional Sessions Judge, Nanded vide Judgment and order dated 18/09/2002 passed in Special Case No. 4 of 1994 from the offences punishable under section 7, 13(2) of the Prevention of Corruption Act, 1988. Hence, the present appeal by the prosecution.

3. The prosecution case, in short, is as under:

"That complainant Nandkumar Joshi a teacher serving at Hivra was in need of a No-Dues Certificate from the Income Tax Office at Nanded, as he had purchased wood from the Forest Department in an auction. Therefore, in order to avoid payment of tax at source, the said No-Dues Certificate was required. He therefore, went to Income Tax Office at Nanded on 08/07/1994 with necessary documents. The present respondent met him there. The complainant showed him all the documents. The respondent told him that one sworn affidavit before a Magistrate is required. The respondent also shown him one of the file from his rack as a sample and therefrom pointed towards one affidavit of one Ismail

Khan. The complainant therefore written on a bond paper an affidavit in his own handwriting. He thereafter signed the said affidavit. The respondent however demanded an amount of Rs. 150/- for doing his work. The respondent thereafter went away. The complainant therefore met the Income Tax Officer. The Income Tax Officer however had found another defect in the documents i.e. there was no permission of construction of the house for which the wood was purchased in auction. In the circumstances, the complainant again met the respondent in his Office on 18/07/1994. The respondent however insisted for an amount of Rs. 150/- and for the documents and told that he would prepare the certificate by 3.00 or 4.00 pm on that day. As the complainant was not willing to pay the bribe, on that day, he lodged his complaint with Anti Corruption Bureau at Nanded."

P.W. 3 - Deputy Superintendent of Police -Devidas Penurkar of Anti Corruption Bureau, Nanded had conducted the investigation. Trap was organized by him. He collected two panch witnesses including P.W. 2 - Balaji Aitwad. The complainant had brought two currency notes in the denomination of Rs. 100/- and Rs. 50/- each. Anthracene powder was applied to it. Said decoy money was kept in the right side pocket of the shirt of the complainant - Nandkumar. A signal was predetermined, in case the respondent would make the demand and accept the decoy money. Panch Balaji Aitwad was directed to accompany the complainant during all this exercise while rest of the raiding party was to remain away in the vicinity.

At about 3:25 pm the party proceeded to the Office of the respondent. In presence of said panch Balaji Aitwad, the complainant asked the respondent for No-Dues certificate. The respondent again made the demand of Rs. 150/- by gestures. The complainant therefore paid the decoy money by his right hand and the respondent accepted the same by his right hand and put the same in the pocket of his T shirt. Thereupon, predetermined signal was given and the respondent was apprehended. Thereafter, exercise of testing the hands and the relevant clothes of the respondent and the complainant was undertaken. It confirmed the passing of the decoy money to the respondent. The panchanama thereupon was prepared.

Thereafter, P.W. 3 - Dy. S.P. Penurkar filed the complaint with the Police Station, Bhagyanagar, on the basis of which the crime was registered. During further investigation, he recorded statements of the witnesses. As the respondent was employee of the Union of India, all the papers were sent to the Central Bureau of Investigation, Mumbai and the crime was transferred to Central Bureau of Investigation, Mumbai. Independent crime was registered by the Central Bureau of Investigation, Nagpur branch and P.W. 6 - Deputy Superintendent of Police, CBI, Nagpur Mr. Sunil Kelkar conducted the investigation. Sanction order was collected from P.W. 4 - Puranlal. He verified the statements of the witnesses and filed the chargesheet.

4. Before the learned Special Judge, in all six witnesses were examined, as detailed supra, including the above detailed witnesses as well as P.W. 5 -Mr.

Manik Petkar, the Income Tax Officer to show the procedure required for obtaining No-Dues certificate. The necessary documents were also proved by the prosecution.

5. The defence of the respondent was as under:-

"That he was merely a Lower Division Clerk working in the Income Tax Office, Nanded. He was not concerned with the issuance of No-Dues certificate. The complainant himself had approached him with the documents. The respondent found that one affidavit was wanting in the necessary documents. Therefore, he voluntarily informed the complainant to bring the complete affidavit. Further, the document regarding permission of construction was not in the file. In the circumstances, the complainant could not get No-Dues certificate. The work was allotted to Income Tax Inspector Mr. Rawat."

It was general practice in the Income Tax Office that one Lawyer and Special Executive Magistrate used to visit the office and carry the work of authenticating affidavits and identifying the affiant. For that purpose, they used to charge certain fees. At the time of trap, the complainant forcibly thrust the amount of Rs. 150/-, to be paid to Income Tax Inspector Mr. Rawat and also as the fees of Lawyer and of the Special Executive Magistrate. The complainant was enraged due to his number of visits to the Income Tax Office and finding that an amount of Rs. 150/- was excessive, which was being collected by the Income Tax Officials towards the Lawyer and the Special Executive Magistrate''s fees, he falsely implicated this Lower Division Clerk in the matter. In the circumstances, he sought acquittal.

6. The learned Special Judge has found that the material statements made by the relevant witnesses in the witness box are absent in the statement recorded by the CBI Investigating Officer Mr. Kelkar. It was further found that the deposition of Deputy Commissioner of Income Tax would itself show that the respondent was not anyway concerned with the work of issuing No-Dues certificate. As per the prosecution case itself, the respondent has provided the complainant one sample affidavit. The complainant merely copied from the said affidavit but the crucial work of his identification before the Special Executive Magistrate and the oath to be administered by the Special Executive Magistrate remained to be made. At the time of trap, as per the prosecution case itself, there was no verbal demand but merely certain gestures were made which led to the giving of the amount. Further, the sanctioning authority has not applied its mind and in all these circumstances, the learned Special Judge acquitted the respondent. Hence, the present appeal.

7. Mr. Alok Sharma, learned Assistant Solicitor General submitted that the respondent has admitted that the decoy money was found on his person. His case itself would show that certain transaction of money was required for passing of the No-Dues certificate. There is no reason to doubt the deposition of the complainant and the panch witness in this regard. The sanction was accorded

after application of mind by the sanctioning authority and hence, he submitted that the appeal be allowed.

8. On the other hand, Mr. Chatterji, learned counsel for the respondent submitted that the learned Special Judge has taken into consideration the vital omissions in the prosecution case. Even the very material statements made by the complainant before the learned Special Judge were absent in the statement recorded by P.W.6 - the Deputy Superintendent of CBI. The sanction was mechanical one. In the circumstances, he submitted that in the present appeal against acquittal, no interference in the order of the learned Special Judge is warranted.

9. On the basis of this material, following points arise for my determination:-

"I) Whether the prosecution has proved that the respondent, being a public servant i.e. a Lower Division Clerk in the Income Tax Office, Nanded during the period of July, 1994, made a demand of Rs. 150/- from complainant - Nandkumar for himself as a gratification other than the legal remuneration, as a motive or reward for passing the No-Dues Certificate to him?

II) Whether the prosecution has further proved that on 11/7/1994, the present respondent had again made the similar demand and accepted the amount of Rs. 150/-, as gratification, as detailed above?

III) Whether the prosecution has further proved that the present appellant being a public servant has demanded and accepted an amount of Rs. 150/- from the complainant by corrupt and illegal means by abusing his position as a public servant?

IV) Whether the sanction accorded is valid?"

My findings to point Nos. (I) to (III) are in the negative, to point No. (IV) is in the affirmative. The appeal is therefore dismissed for the reasons to follow.

REASONS

10. As regards the sanction, the sanctioning authority the Deputy Commissioner of Income Tax has deposed that he has perused all the records and upon satisfaction, issued the sanction order.

The learned Special Judge however has held that the sanction is not valid for the reason that the sanctioning authority has not considered that it was not the duty of the respondent to issue No-Dues Certificate.

11. It should however be noted that the prosecution has also alleged that the respondent has committed criminal misconduct by demanding and accepting the amount of Rs. 150/- by corrupt or illegal means by abusing his position as a public servant - the offence punishable under section 13(2) of the Prevention of Corruption Act, which has nothing to do with the carrying or forbearing any official act. In that view of the matter, the sanction will have to be held as valid

one.

12. As regards the merit of the case, however, according to the prosecution case itself, the complainant would have saved an amount of Rs. 470/- i.e. the deduction at source of the income tax, in case he would have been able to file the No-Dues certificate from the Income Tax Office, Nanded. During the relevant period, he was posted at Hivra, Tq. Mahagaon, Dist. Yawatmal. He had to attend the Income Tax Office at Nanded time and again, as detailed in his complaint to obtain this Certificate only to save Rs. 470/-. Initially, when he happened to meet the present appellant, the issue of absence of the affidavit was raised. Thereafter, when he met the Income Tax Officer, he found another defect i.e. the permission to construct the house. Thus, in order to save the income tax of Rs. 470/-, he was required to visit from Hivra to Nanded Office of Income Tax, time and again.

The affidavit placed by him at Exhibit 22 and as seized by the Investigating Officer does not show that it was sworn before any Executive Magistrate or the affiant was identified by any person or Advocate as against the sample of the affidavit, copy of which is at Exhibit 33. Thus, though the complainant has submitted all the necessary documents one after another by visiting time and again the Income Tax Office, Nanded, still the lacuna in his affidavit is noted that it was neither sworn before the Executive Magistrate nor anybody has identified him. This lends credence to the defence that it was the practice in the Income Tax Office that a Lawyer and a Special Executive Magistrate happen to visit the Income Tax Office to do all the needful act, as detailed supra and to charge for the same.

13. It is an admitted fact that at the time of the trap, the respondent did not make any clear demand of money of Rs. 150/-, but as per the prosecution case itself, from a long distance the respondent shown the fingers which were interpreted as demand of money.

14. Further statements recorded by the Investigating Officer of C.B.I. P.W. 6 - Sunil Kelkar were filed with the chargesheet. They were merely in the form of verification of the earlier statement in which details of incident are not given. Statement recorded by P.W. 3- Deputy Superintendent of Police -Devidas Penurkar of A.C.B. Nanded were not placed on record.

The defence, therefore, put the omissions of all the material facts, as deposed to by the prosecution witness in the witness box to the statement recorded by the next of the Investigating Officer of CBI Mr. Kelkar.

Upon query from this Court, learned Assistant Solicitor General collected the copies of those earlier statements and placed the same on record in the present appeal. It is thus clear that in the chargesheet, P.W.6 failed to file the original statements and now upon query in the appeal by the Court, those are filed. The material lacuna however as pointed out by the defence during trial cannot be overcome by this exercise.

15. Though, in the normal circumstances, therefore, the case could have been remanded to the learned trial Court for having retrial; considering the fact that the alleged act/incident has occurred in the year 1994, that the Special Judge has acquitted the present respondent in the year 2002, and that the present appeal is being decided in the year 2015, in the facts of the present case that the respondent had no official duty to carry in the matter and in view of the fact that the respondent did not make any demand at the time of trap before the independent panch witness and the complainant was enraged because he was compelled to pay frequent visits to Anti Corruption Bureau, Nanded, already a reasonable doubt has arisen in the case. In that view of the matter, I do not think it fit to remand the case and order retrial. Hence, the following order:-

16. Criminal Appeal is hereby dismissed.

17. The bail bonds, if any, of the present respondent shall stand cancelled.

18. Disposal of the property involved in the offence be carried on the line of the directions issued by the learned Special Judge (Under Provisions of Corrupt Act) and Additional Sessions Judge, Nanded.

19. Criminal Appeal stands disposed of.