
(2015) 03 BOM CK 0275

In the Bombay High Court

Case No : Criminal Revision Application Nos. 47, 25 of 2012 and 190 of 2013

Manohar Ganpatrao Kapsikar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 05-03-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 197
Penal Code, 1860 (IPC) — Section 109, 120B, 409, 420
Prevention of Corruption Act, 1988 — Section 10, 11, 13, 13(1)(c)(d), 13(2)

Citation : (2015) ALLMR(Cri) 2513

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

Bench : Single Bench

Advocate : V.D. Hon, Senior Advocate i/b Jiwan J. Patil, Vijay Sharma and R.N. Chavan, for the Appellant; V.D. Godbharle, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

V.M. Deshpande, J—Rule. Rule is made returnable forthwith. Heard finally with the consent of the parties.

These three Revisions can be disposed of by this common judgment, since those arise out of the common order, passed by the learned Additional Sessions Judge-2, Ambejogai in Special Case No. 5 of 2004. By the impugned order, the learned Additional Sessions Judge-2, Ambejogai rejected the respective applications filed by the applicants in the present three Revisions for discharge.

FACTS IN RESPECT OF CRIMINAL REVISION APPLICATION No. 47/2012

The applicant in the present Criminal Revision is original accused No. 20. At the relevant time he was discharging his duties as Executive Engineer, Majalgaon Canal Division No. 6; whereas deceased accused Narayan Narhari Joshi (accused No. 21) was Store Keeper; and accused No. 22 Kawdu Namdeo Patil was a Divisional Accountant at the said Division No. 6.

The Superintendent of Police, Anti Corruption Bureau, Aurangabad lodged a

report with Police Station, Parli Vajinath Urban on 24.6.1985. The said first information report was recorded as Crime No. 74 of 1985 for the offences punishable under Section 409 of the Indian Penal Code and under Section 5 (2)(c) (d) of the Prevention of Corruption Act, 1947.

After completion of the investigation, charge sheet was filed.

The accusation in respect of the present applicant in the charge sheet and in particular at Appendix IV which pertains to Majalgaon Canal Division No. 6. Sum and substance of the accusations against the applicant is, during the period of 4.1.1981 to 31.3.1982 the present applicant, accused Nos. 21 and 22 have made purchases of nine items, namely (1) Survey material (2) T and P articles (3) Steal cupboard (4) Air Cooler (5) Water Cooler (6) Tubular Structure (7) Straight Rods and Nuts Washers (8) Calculators and (9) Petromax.

According to the accusations, as found in the said Appendix, the applicant along with accused Nos. 21 and 22 purchased the afore said articles without following the procedure and thereby caused loss of Rs. 98,055.17 Ps. to the Government. Therefore, the charge sheet was presented against the applicant for the offence punishable under Sections 120B, 420, 409, 109 of the Indian Penal Code for the offence punishable under Section 5(2)(c)(d) of Prevention of Corruption Act (corresponding to Section 13(2) r/w Section 13(1)(c)(d) of the Prevention of Corruption Act, 1988).

Thus, according to the prosecution, the purchases for the afore said items were made by the applicant with other accused in conspiracy with each other in breach of the Rules and has thus committed the offences.

Undisputedly, a departmental proceeding was initiated against the present applicant for causing financial loss to the State. The said inquiry was held against the applicant in the year 1986.

After completion of the departmental inquiry, the punishment was inflicted upon the applicant by passing the order of reduction in rank from Executive Engineer to the Deputy Engineer.

The applicant carried said matter up to Hon''ble Apex Court and Hon''ble Apex Court in Civil Appeal No. 4178 of 1994, by order dated 5.5.1994 substituted the punishment from reduction of rank to withholding of one increment of the applicant in the pay scale of Executive Engineer for a period of three years without cumulative effect with effect from November, 1986.

The applicant moved an application (Exh. 190) in Special Case No. 5 of 2004 for discharge. The said application is rejected on 9.12.2011. Hence, present Revision.

FACTS IN RESPECT OF CRIMINAL REVISION APPLICATION No. 25/2012

The applicant in present Criminal Revision is accused No. 12 in Crime No. 74 of 1985. At the relevant time, the applicant was working as Sub-Divisional Engineer at Shirsala Sub-Division No. 17 of Majalgaon Canal Division No. 4 during the

period 1.7.1981 to 31.3.1984 and one Shri Gulam Ali Jafarsaheb Soudagar was working with him as Junior Engineer, who is shown accused No. 13 in the charge sheet.

The allegation against the applicant is that as per order, dated 16.10.1991, two tonne capacity weighing machine of Everest make specification 1436/1960 was ordered. Junior Engineer Soudagar (accused No. 13) took the entry in the measurement book on 26.12.1981 and the applicant signed the same as "checked by him". The supplier, however, did not supply the machine as per order and instead he supplied weaving machine of Western Scale Company.

Thus, it is alleged that the present applicant in collusion with Junior Engineer Soudagar took entry without taking the material.

The applicant also filed an application for discharge. The said application is at Exh. 193 in Special Case No. 5 of 2004 which is rejected by the court below. Hence, this Revision.

FACTS IN RESPECT OF CRIMINAL REVISION APPLICATION No. 190/2013

The applicant in this Criminal Revision is accused No. 24 in Special Case No. 5 of 2004.

At the relevant time, the applicant was working as Executive Engineer at Majalgaon Canal Division No. 7. It is alleged that, the applicant, during the period 1.6.1981 to 31.3.1982 made purchases of 20 items above the prevailing market rate and thus caused loss of Rs. 1,68,524.97 Ps. to the Government. It is further alleged that the applicant during the period 1.9.1981 to 12.12.1981 made purchases of four items which were not immediately required and thus an amount of Rs. 2,27,484/- was blocked.

Undisputedly, on very same allegations the applicant was proceeded in a departmental inquiry in the year 1986. The punishment was inflicted upon the applicant to the effect of reduction of rank to the lower post from Executive Engineer to the Deputy Engineer.

The said order was challenged by the applicant by filing the Writ Petition bearing No. 1744 of 1987. After the establishment of Maharashtra Administrative Tribunal, the said Writ Petition was transferred before the Maharashtra Administrative Tribunal, Aurangabad, Bench at Aurangabad and was reregistered as present Application No. 1312 of 1991.

The Tribunal vide judgment dated 12.6.1996 partly allowed the said proceeding filed by the applicant and quantum of punishment was reduced to withholding of one increment of the applicant with effect from November, 1986 for a period of three years without cumulative effect.

The applicant moved an application for discharge (Exh. 139), however, the said application was rejected by the common order. Hence, the present Revision.

I have heard Shri V.D. Hon, learned Senior Counsel along with Shri Jivan Patil in Criminal Revision Application No. 47 of 2012. The learned counsel Shri Vijay Sharma in other two Criminal Revision Applications has adopted the arguments of learned Senior counsel.

2. Learned Senior counsel opened his arguments with the submission that the case against the applicant (accused No. 20) cannot proceed further for want of sanction. He invited my attention to Section 19 of the Prevention of Corruption Act, 1988 which opens with the words, "No Court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction".

He invited my attention to the order passed by this court on 2.12.2014, whereby this court directed the State to file an affidavit as to whether the State wants to prosecute the applicant (accused No. 20) for the offences under the Prevention of Corruption Act and in that case whether the prosecution agency intends to move the authority for sanction under the said Act. He further pointed out that in view of the said order, affidavit dated 20.1.2015 is filed on record, which reflects that it is decided not to seek fresh sanction for the offences under the Prevention of Corruption Act. Therefore, he submitted that even though there is a sanction against the applicant for prosecution for the offences punishable under the Indian Penal Code, same is of no use.

3. This submission of the learned Senior counsel is vehemently opposed by Shri V.D. Godbharle, learned Additional Public Prosecutor and in my opinion, the learned Additional Public Prosecutor is right in submitting that the sanction as contemplated under Section 19 of the Prevention of Corruption Act is not necessary in respect of the applicant (accused No. 20). Applicant (accused No. 20) Manohar Ganpat Kapsikar stood retired from service on attaining the age of superannuation on 31.3.1992; whereas the charge sheet is presented in the court of law on 13.9.2004.

Learned Additional Public Prosecutor has pointed out following authoritative pronouncements of Hon"ble Apex Court to buttress his submission that since on the date when the charge sheet was presented the applicant Kapsikar (accused No. 20) was not in service, and therefore, he cannot claim any immunity on the ground of want of sanction.

" State of Kerala Vs. V. Padmnabhan Nair, AIR 1999 SC 2405 : (1999) CriLJ 3696 : (1999) 3 Crimes 103 : (1999) 2 CTC 643 : (1999) 4 JT 499 : (1999) 4 SCALE 82 : (1999) 5 SCC 690 : (1999) 3 SCR 864 : (1999) AIRSCW 2526 : (1999) 6 Supreme 1 State of H.P. Vs. M.P. Gupta, (2003) 10 JT 32 : (2003) 10 SCALE 522 : (2004) 2 SCC 349 : (2003) 6 SCR 541 Supp]

State of H.P. v. M.P. Gupta"

These two authoritative pronouncements from the Apex Court clearly settle the issue in favour of the prosecution. In paragraph 17 of State of H.P. Vs. M.P.

Gupta, (2003) 10 JT 32 : (2003) 10 SCALE 522 : (2004) 2 SCC 349 : (2003) 6 SCR 541 Supp] the Apex Court has observed as under:--

"The correct legal position, therefore, is that an accused facing prosecution for offences under the Old Act or New Act cannot claim any immunity on the ground of want of sanction, if he ceased to be a public servant on the date when the court took cognizance of the said offences. But the position is different in cases where Section 197 of the Code has application."

Same was the earlier view of the Apex Court as found in the case of State of Kerala v. V. Padmanabhan Nair which ruled as under:--

"An accused facing prosecution for offences under the PC Act cannot claim any immunity on the ground of want of sanction, if he ceased to be a public servant on the date when the court took cognizance of the said offences. "

Admittedly, in the present case, when the court took cognizance, that time applicant Kapsikar (accused No. 20) ceased to be a public servant in view of his superannuation. In that view of the matter, the submissions of the learned Senior counsel that the proceedings against accused No. 20 cannot proceed further for want of sanction are devoid of any substance and said argument is hereby rejected.

4. The main thrust of the submission on the part of the learned Senior counsel is that it is not at all alleged in the charge sheet against any of the applicants that they have misappropriated any amount. He submitted that none of the ingredients for the offences punishable under the Indian Penal Code are there, even prima facie, on the plain reading of the accusations made against each of the applicants in these three Revisions. He submitted, at the most, the applicants in these three cases have committed certain administrative lapses and have caused some financial loss, however, he submitted that no recovery proceedings were initiated against the present applicants to make good the said financial loss alleged to have been caused by the inappropriate acts of the applicants. Therefore, he submitted that each of the applicants in the present cases need to be discharged.

5. Per contra, the learned Additional Public Prosecutor has submitted that sufficient material is available in the charge sheet, by which it could be said that trial can go on against each of the applicants. He took me through various statements of witnesses recorded during the course of the investigation. He reiterated that following are the prime accusations against the applicants which are also enumerated in the impugned order passed by the learned court below. According to the learned Additional Public Prosecutor, if following accusations are considered in its true perspective, then it is clear that there exist a case against the applicants warranting their trial.

"(i) They have not prepared the estimate of purchased articles.

(ii) They have not considered rate contract before purchase.

- (iii) They have not purchased articles from Small Scale Industry.
- (iv) They have not purchased UGI Sheets angles from the Government.
- (v) They have not got confirmed whether furniture purchased by them can be available from Prison.
- (vi) They have not got confirmed that articles were available for lessor rate.
- (vii) They have not given public notice before purchase of goods and articles of Rs. 25,000/- or more.
- (viii) They have accepted quotations on same day and placed order on same day from same person.
- (ix) They have given repeat order to same supplier.
- (x) They have purchased goods and articles even though it was not required at higher rate."

6. After hearing, it is clear that a departmental proceeding was initiated against applicant Kapsikar (accused No. 20) and applicant Rajaram Janwadkar (accused No. 24). Both of them were inflicted punishment of reduction of rank from Executive Engineer to the Deputy Engineer.

So far as accused No. 20 Kapsikar is concerned, he carried the matter upto Apex Court. The Apex Court in Civil Appeal No. 4178 of 1994 filed by applicant Kapsikar (accused No. 20) has passed following order:--

"ORDER

Special leave granted.

Heard parties. We had issued notice in this matter confined only to the quantum of punishment. We feel that the punishment in the circumstances is too harsh. There is no finding recorded even by the Inquiry Officer that the appellant was guilty of any misconduct involving moral turpitude, much less of misappropriation of any amount. All that had happened was that the appellant as an Executive Engineer being an Incharge of the Project had rushed through certain things without following the proper procedure. We are, therefore, of the view that the interests of justice would be met if one increment of the appellant in the pay scale of the Executive Engineer is withheld for a period of three years without cumulative effect w.e.f. November 1986. The punishment imposed on the appellant is accordingly modified. The appeal is allowed to the above extent with no order as to costs."

7. Perusal of the afore said order from the Apex Court thus clearly reveals that Apex Court has accepted the finding of the Inquiry Officer that applicant Kapsikar (accused No. 20) cannot be held guilty of misconduct involving moral turpitude, much less of misappropriation of any amount.

Similarly, in so far as the departmental proceedings against applicant Rajaram Janwadkar (accused No. 24), the Maharashtra Administrative Tribunal has also passed the order modifying sentence in view of the order of Hon''ble Apex Court, as reproduced herein above.

8. Thus, it is clear that Hon''ble Apex Court has endorsed the finding of the Inquiry Officer that there is no misappropriation of any amount on the part of the applicants, coupled with the fact that there is no iota of allegation in entire charge sheet that any of the applicants in these three Revision Applications has misappropriated any amount.

There is no mention in the entire charge sheet that they have caused wrongful gain to themselves. No such evidence is present in the case.

9. After scanning the complete charge sheet in so far as the present applicants are concerned, it is clear that the accusations made against the applicants cannot travel beyond the accusations which are enumerated in the preceding paragraph No. 6. The said accusations clearly show that they do not travel beyond the administrative lapses, not following the administrative guidelines, etc., however, those do not speak any criminality on the part of the applicants.

10. In the light of above, it would be useful to have the references on following Apex Court decision:--

" C. Chenga Reddy and Others Vs. State of Andhra Pradesh, (1996) 5 AD 445 : AIR 1996 SC 3390 : (1996) CriLJ 3461 : (1996) 3 Crimes 119 : (1996) 6 JT 739 : (1996) 5 SCALE 318 : (1996) 10 SCC 193 : (1996) 3 SCR 479 Supp "

In this authoritative pronouncement, Apex Court has observed in paragraphs 19 and 22 as follows:--

"(19) The conclusions arrived at by the courts below that the official appellants did not follow the codal provisions and that they have committed gross financial irregularities and administrative lapses in the matter of clearance of the prickly pier jungle under Kudimaramath Rules and other relevant provisions cannot be faulted with but nonetheless, the same cannot be construed as "incriminating circumstances" to fasten criminal liability on the appellants.

(22) On a careful consideration of the material on the record, we are of the opinion that though the prosecution has established that the appellants have committed not only codal violations but also irregularities by ignoring various circulars and departmental orders issued from time to time in the matter of allotment of work of jungle clearance on nomination basis and have committed departmental lapse yet, none of the circumstances relied upon by the prosecution are of any conclusive nature and all the circumstances put together do not lead to the irresistible conclusion that the said circumstances are compatible only with the hypothesis of the guilt of the appellant and wholly incompatible with their innocence."

11. As observed in the preceding paragraphs that even in the departmental proceedings the Inquiry Officer did not find that Kapsikar and Janwadkar were guilty of any misappropriation, which has received stamp of approval from Hon"ble Apex Court and as observed above, there are no allegations in the charge sheet about the misappropriation. Thus it is found in the departmental proceedings that the applicants have not committed any misappropriation wherein the standards of proof are much lesser which will be required in the criminal case.

In one of the reported judgment, in the case of Abdulla Mohammed Pagarkar etc. Vs. State (Union Territory of Goa, Daman and Diu), AIR 1980 SC 499 : (1980) 3 SCC 110 , Apex Court has observed as under:--

"(15) Learned counsel for the State sought to buttress the evidence which we have just above discussed with the findings recorded by the teamed Special Judge and detailed as items (a) to (e) in paragraph 5 and items (i) and (iii) in paragraph 6 of this judgment. Those findings were affirmed by the learned Judicial Commissioner and we are clearly of the opinion, for reasons which need not be restated here, that they were correctly arrived at. But those findings merely make out that the appellants proceeded to execute the work in flagrant disregard of the relevant Rules of the G.F.R. and even of ordinary norms of procedural behaviour of Government officials and contractors in the matter of execution of works undertaken by the Government. Such disregard however has not been shown to us to amount to any of the offences of which the appellants have been convicted. The said findings no doubt make the suspicion to which we have above adverted still stronger but that is where the matter rests and it cannot be said that any of the ingredients of the charge have been made out."

12. Thus, several irregularities as pointed out in the impugned order, as submitted by the learned Additional Public Prosecutor, may give rise to strong suspicion in respect of bona fides of the applicants, however, suspicion could not be a substitute for proof. Suspicion is not sufficient for conviction.

On this cardinal principle of criminal jurisprudence, in my view. It will be futile exercise to continue the case against the present applicants. It will be nothing but the abuse of process of law.

On examination, therefore, I am of the opinion that the applicants have made out their respective case for discharge in their favour, and accordingly, the present Criminal Revision Applications are allowed.

The order passed by the Additional Sessions Judge-2 Ambejogai, dated 9.12.2011, below Exhs. 190, 193, 139 in Special Case No. 5 of 2004 is hereby quashed and set aside.

The applicant Manohar Ganpat Kapsikar (accused No. 20), applicant Mdhukar Ramchandra Kulkarni (accused No. 12) and applicant Rajaram Shankarrao Janwadkar (accused No. 24) stand discharged from Special Case No. 5 of 2004

pending on the file of the Additional Sessions Judge-2, Ambejogai.
Rule in all the Revisions made absolute accordingly.