(2021) 03 KL CK 0184

In the High Court Of Kerala

Case No : Criminal Appeal No. 115 Of 2018

M.K. Valsamma APPELLANT

Vs

State Of Kerala RESPONDENT

Date of Decision : 17-03-2021

Acts Referred:

Prevention of Corruption Act, 1988 — Section 2(c), 13(1)(c), 13(1)(d), 13(2)
Code Of Criminal Procedure, 1973 — Section 162, 162(1), 162(2), 164, 313
Evidence Act, 1872 — Section 47, 114

Citation : (2021) 03 KL CK 0184

Hon'ble Judges : R. Narayana Pisharadi, J

Bench : Single Bench

Advocate : Jossy Kurian, A Rajesh

Final Decision : Allowed

Judgement

1. A teacher shall be a role model, not only for the students but also for the society. But, the appellant, who was a teacher and a headmistress, did not prove to be so. It is unfortunate that she had shown deviance from the path of honesty and integrity.

2. The appellant is the sole accused in the case C.C No.69/2011 on the file of the Court of the Enquiry Commissioner and Special Judge, Kottayam. She stands convicted and sentenced by that court for committing the offences punishable under Sections 13(1)(c) and 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988 (for short 'the Act').

3. The gist of the prosecution is as follows: The accused was the headmistress of the Government Tribal Upper Primary School, Kombukuthy during the period from 01.06.2006 to 19.03.2008. Smt.Joice Rose Thomas (PW3) and Smt.Radhamaniamma (PW4) were teachers in that school during the year 2006. On 16.10.2006, the accused, dishonestly and fraudulently, by abusing her official position as a public servant, withdrew Rs.24,960/-each from the General Provident Fund (GPF) account of PW3 and PW4, without their knowledge and she

misappropriated that money. Neither PW3 nor PW4 had made any application for sanctioning loan from the GPF.

4. The trial court framed charge against the accused for the offences under Section 13(1)(c) read with 13(2) of the Act and Section 13(1)(d) read with 13(2) of the Act. The accused pleaded not guilty and she claimed to be tried.

5. The prosecution examined the witnesses PW1 to PW13 and marked the documents Exts.P1 to P32. No evidence was adduced by the accused.

6. The trial court found the accused guilty of the offences punishable under Sections 13(1)(c) and 13(1)(d) read with 13(2) of the Act and convicted her thereunder. The trial court sentenced the accused to undergo rigorous imprisonment for a period of two years each and to pay a fine of Rs.10,000/- each and in default of payment of fine, to undergo simple imprisonment for a period of three months each for the offences under Sections 13(1)(c) and 13(1)(d) read with 13(2) of the Act and directed that the substantive sentences of imprisonment shall run concurrently.

7. This appeal is filed by the accused challenging the order of conviction and sentence passed against her by the trial court.

8. Heard the learned counsel for the appellant and the learned Public Prosecutor and also perused the records of the case.

9. The accused was the headmistress of the Government Tribal Upper Primary School, Kombukuthy (hereinafter referred to as 'the school') during the period from 01.06.2006 to 19.03.2008. She was a public servant as defined under Section 2(c) of the Act. PW3 and PW4 were teachers of the same school during the year 2006. There is no dispute with regard to these facts.

10. Ext.P1 is the copy of the order dated 04.08.1999 issued by the Director of Public Instruction. It shows that the headmistress of a government school had the authority to sanction temporary advance (loan) from the GPF upto an amount of Rs.25,000/-.

11. PW1 is a person who had worked as Superintendent in the office of the Deputy Director of Education at Kottayam for a long period. He has given evidence with regard to the procedure to be followed for sanctioning loan from the GPF and encashment and disbursement of the loan amount to the persons concerned. The evidence of PW1 reveals that the following procedure had to be followed in that regard. The teacher concerned should make an application, with necessary particulars, for sanctioning loan from the GPF. The application shall be in the prescribed form. The headmaster would verify whether the amount is in credit in the GPF account of the applicant. Loan could be sanctioned by the headmaster within the limit prescribed by the Government. The bill for payment along with the sanction order would be then presented in the treasury concerned. The treasury would pass the bill and issue a pay order cheque which could be encashed through a bank. After encashing the amount, the details

would be entered in the cash book kept in the school and then the amount would be paid to the teacher concerned after getting the signature of the teacher on the revenue stamp affixed in the acquittance roll.

12. The evidence of PW1 with regard to the above procedure as to sanctioning of loan from the GPF and encashment and disbursement of the amount has not been challenged by the accused in the cross-examination of that witness. Learned counsel for the appellant has not raised any contention disputing the existence of or the regularity of the above procedure.

13. Moreover, when examined under Section 313 Cr.P.C, the accused has admitted that she was the person who used to prepare the salary bills and GPF payment bills. She also used to go to the treasury and the bank for presenting the bill and encashment of the amount.

14. Ext.P8 is the main cash book kept in the school. Page 81 of Ext.P8 cash book, which is marked as Ext.P8(a), contains the entries with regard to the transactions on 16.10.2006. The entry in Ext.P8(a) in Ext.P8 cash book is to the effect that, on 16.10.2006, an amount of Rs.49,920/- was disbursed to the incumbents concerned as GPF advance.

15. PW2 was a teacher, who had worked along with the accused in the school. PW2 has given evidence that she had worked in the school when the accused was headmistress there. She has given evidence that she is familiar with the signature of the accused and that she could identify the signature of the accused. PW2 identified the signatures of the accused in pages 66 to 69 of Ext.P8 cash book. But she has not given any evidence with regard to the relevant entries in Ext.P8(a) (page 81 of Ext.P8 cash book), with regard to disbursement of Rs.49,920/- as GPF advance to the persons concerned. Though PW3, PW4 and PW7 have also given evidence that Ext.P8(a) page of Ext.P8 cash book contains entry with regard to disbursement of Rs.49,920/- as GPF advance, there is no evidence to show that the entry in that regard in Ext.P8(a) for the date 16.10.2006 is in the handwriting of the accused or that the accused was the person who made that entry. There is also no signature of the accused against this entry in Ext.P8(a) page of Ext.P8 cash book.

16. Ext.P10 is the treasury bill book issued from the treasury to the school. Ext.P10(b) is the page in Ext.P10 of the treasury bill book which contains entries for the date 16.10.2006. The entries in Ext.P10(b) page of the treasury bill book show that the accused had presented the bill for an amount of Rs.49,920/- in the treasury on 16.10.2006, for payment of GPF advance to PW3 and PW4. Ext.P10(b) page of the treasury bill book also contains entry that the treasury had passed the above bill for Rs.49,920/- on 16.10.2006.

17. PW2 has given evidence that the accused has signed in the treasury bill book and obtained the amount of Rs.49,920/- from the treasury. The evidence of PW2 in this regard remains unchallenged by the accused in the cross-examination.

18. Ext.P12 is the pay order cheque dated 16.10.2006 for Rs.49,920/- issued from the Sub Treasury, Mundakayam to the headmaster of the school. The signatures of the accused on the back of Ext.P12 pay order cheque have been proved through PW6, who had worked as a Peon in the school from July, 2004 to May, 2007. The accused has signed on the back of the pay order cheque acknowledging receipt of the amount of the cheque from the bank. PW6 has given evidence that, while he was working in the school, he had seen the accused signing documents. He has stated that he is familiar with the signatures of the accused. He identified the signatures of the accused on the back of Ext.P12 pay order cheque. His evidence in that regard was not challenged by the accused in the cross-examination. The signatures of the accused on the back of Ext.P12 pay order cheque would show that she had received the cheque from the treasury and encashed it through the State Bank of Tranvancore, Mundakayam Branch. 19. Ext.P9 is the acquittance roll kept in the school. It does not contain any entry which would show that either PW3 or PW4 or any other person had received the amount sanctioned as GPF advance on 16.10.2006 or it was paid to any person. If the amount was paid to PW3 or PW4 by the accused, after receiving it as per Ext.P12 pay order cheque from the bank, it was incumbent upon her to obtain their signature on a revenue stamp affixed in the acquittance roll. There is no such entry in Ext.P9 acquittance roll for the month of October, 2006.

20. Under Section 47 of the Indian Evidence Act, when the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed is a relevant fact. As per the explanation to Section 47 of the Evidence Act, a person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purported to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

21. The signature of the accused in Ext.P10 treasury bill book was identified by PW2. The signature of the accused on the back of Ext.P12 pay order cheque was identified by PW6. PW2 and PW6 are persons who had occasion to work along with the accused in the same school and who were familiar with the signature of the accused. They are persons who had occasion to see the accused sign in documents. The evidence of PW2 and PW6, identifying the signature of the accused in the above documents, is relevant and in the absence of any challenge made by the accused to their evidence in that regard through cross-examination, the signature on those documents is proved to be that of the accused. The evidence of these witnesses with regard to the signature of the accused in Ext.P10 treasury bill book and Ext.P12 pay order has to be appreciated in the light of the admission made by the accused during the examination under Section 313 Cr.P.C that she was the person who was dealing with the work of

preparation of treasury bills and presentation of bills in the treasury and also the transactions with the treasury and the bank.

22. Further, there is also the evidence of PW3 and PW4, the teachers who were allegedly defrauded by the accused, with regard to the signatures of the accused on Ext.P12 pay order cheuqe. Both PW3 and PW4 have given evidence that they had seen the accused sign documents while they were working in the school and they are familiar with the signature of the accused. Both of them identified the signatures of the accused on the back of Ext.P12 pay order cheque. There is no reason to disbelieve their evidence on that aspect.

23. PW7 was the headmistress of the school during the period from 05.10.2009 to 26.04.2010. Ext.P20 is a communication made by PW7 to the investigating officer. It is stated in Ext.P20 letter that applications made by PW3 and PW4 for sanction of advance from the GPF account are not available in the school. It is also stated in Ext.P20 letter that PW7 searched for those records but she could not find out any such records in the school. Ext.P20 letter, being a statement made by a witness to the investigating officer during the investigation of the case, is hit by Section 162 Cr.P.C.

24. The statement made by any person to a police officer in the course of an investigation cannot be used for any purpose except for the purpose of contradicting a witness, as mentioned in the proviso to sub-section (1) of Section 162 Crl.P.C or for the purposes mentioned in sub-section (2) of that provision. The prohibition contained in Section 162 Cr.P.C relates to all statements made during the course of an investigation. The prohibition relating to the use of a statement made to a police officer during the course of an investigation cannot be set at naught by the police officer not himself recording the statement of a person but having it in the form of a communication addressed by the person concerned to the police officer. If a statement made by a person to a police officer in the course of an investigation is inadmissible, except for the purposes mentioned in Section 162 Cr.P.C, the same would be true of a letter containing narration of facts addressed by a person to a police officer during the course of an investigation. It is not permissible to circumvent the prohibition contained in Section 162 Cr.P.C by the investigating officer by obtaining a written statement of a person instead of the investigating officer himself recording that statement (See Kali Ram v. State of Himachal Pradesh : AIR 1973 SC 2773).

25. However, the evidence given by PW7 in the court that no application for sanction of loan from the GPF made by PW3 or PW4 was seen in the files kept in the school is admissible in evidence. There is no reason to disbelieve her evidence in that regard. She has stated on cross-examination that she had verified all the GPF files kept in the school.

26. During the cross-examination of PW2, suggestions were made to the effect that Ext.P9 is not the real acquittance roll (register) kept in the school. PW2 has given evidence in the re-examination that the entries in pages 10 and 11 of

Ext.P9 acquittance roll (for the month of October, 2006) are in the handwriting of the accused. PW2 was not further cross-examined by the accused challenging the above evidence. Therefore, it is proved by the evidence of PW2 that Ext.P9 acquittance roll contains some entries in the handwriting of the accused, for the month of October, 2006. Therefore, there is no merit in the contention of the accused that Ext.P9 is not the real acquittance roll which was kept in the school for the relevant period.

27. The accused has got no plea that Ext.P8 cash book, Ext.P10 treasury bill book and Ext.P12 pay order cheque are documents concocted by the prosecution. The entries made by the accused and her signature in Ext.P10 treasury bill book and Ext.P12 pay order cheque have been proved through competent witnesses who are acquainted with her signature. As noticed earlier, during the examination under Section 313 Cr.P.C, the accused admitted that she was the person who used to prepare the treasury bills and to go to the treasury and the bank for encashment of the amount. The documents mentioned above would conclusively prove that the accused had prepared the treasury bill for encashment of Rs.49,920/- as advance from the GPF account of PW3 and PW4 and that she had presented the bill in the treasury and obtained the pay order cheque from the treasury and encashed it through the bank and received the amount. There is no entry in Ext.P9 acquittance roll which would show that she paid the above amount to PW3 or PW4 or to any other person. Thus, the prosecution could prove beyond reasonable doubt that the accused had withdrawn an amount of Rs.24,960/- each (total Rs.49,920/-) from the GPF accounts of PW3 and PW4 and that she did not pay that amount to them.

28. Ext.P11 is the GPF account statement issued to PW3 by the Accountant General. It relates to the period April, 2005 to March, 2007. The statement for the period from April, 2006 to March, 2007 is dated 21.01.2008. It shows that an amount of Rs.24,960/- was debited from the GPF account of PW3 in the month of October, 2006.

29. Ext.P15(a) is the GPF account statement issued to PW4 by the Accountant General. It relates to the period April, 2006 to March, 2007. It is dated 30.01.2008. It shows that an amount of Rs.24,960/-was debited from the GPF account of PW4 in the month of October, 2006.

30. PW3 and PW4 have deposed that debiting of Rs.24,960/-from their GPF account in the month of October, 2006 came to their notice only when they received Exts.P11 and P15 statements of account from the Accountant General.

31. PW3 has given evidence that, when the withdrawal of Rs.24,960/- from her GPF account came to her notice, she enquired the matter with the accused. PW3 has stated that, then the accused told her that she would repay the amount to her. When she did not get the money from the accused, PW3 gave Ext.P3(d) complaint to the Deputy Director of Education. PW3 has categorically stated that she had not given any application for sanctioning advance from her GPF account.

32. PW4 has also given evidence that, when the withdrawal of Rs.24,960/- from her GPF account came to her notice, she asked the accused about it. PW4 has deposed that the accused then admitted to her that it was she who had withdrawn the amount and that she told her (PW4) that she would give the amount to her. PW4 has given evidence that, when the accused did not give the amount, she gave Ext.P3(e) complaint to the Deputy Director of Education. PW4 has denied the suggestion made to her in the cross-examination that she had given application for granting loan from the GPF account.

33. PW3 and PW4 had given statements under Section 164 Cr.P.C to the Judicial First Class Magistrate concerned. These statements were marked through PW3 and PW4 as Ext.P14 and Ext.P17 documents. No question was put to PW3 and PW4 in the cross-examination regarding the statement made by them before the Magistrate concerned. No omission or contradiction in their testimony before the court, with reference to Exts.P14 and P17 statements given under Section 164 Cr.P.C, was brought out in evidence. Exts.P14 and P17 statements given by PW3 and PW4 under Section 164 Cr.P.C before the Magistrate concerned corroborate their testimony in the court in material particulars. It is well settled that the statement given by a witness under Section 164 Cr.P.C can be used for corroborating the testimony of that witness in the court (see Shaji v. State of Kerala: AIR 2013 SC 651).

34. The evidence of PW3 and PW4 establishes the fact that they had not given any application for sanctioning loan from the GPF account. Their evidence in that regard is corroborated by the testimony of PW7.

35. The evidence of PW3 and PW4 also proves the extra judicial confession made to them by the accused regarding the withdrawal of amount from their GPF accounts without their knowledge. The evidence of PW3 and PW4 proves that the withdrawal of the amount came to their notice when they received the GPF account statements from the Accountant General and then they enquired the matter with the accused and then the accused admitted to them that it was she who had withdrawn the amount from their GPF accounts. The evidence of PW3 and PW4 in this regard is reliable and trustworthy. There is no reason to reject their evidence on this aspect.

36. In view of the plethora of evidence against the accused as noticed above, I find it not necessary to consider whether the admission of guilt made by the accused in Ext.P3(b) statement in writing given to the District Education Officer as to the defalcation of the amount is admissible or not as an extra judicial confession.

37. The plea of the accused in the written statement filed in the court by her after her oral examination under Section 313 Cr.P.C is as follows: In the month of October, 2006, she requested PW3 and PW4 to give her money as loan. Then PW3 and PW4 told her that they would take loan from their GPF account and give it to her and she would have to repay the amount in time. On the basis of the

applications made by PW3 and PW4, loan was taken from their GPF accounts and they gave her that amount as loan. She could not repay them the amount in time and then PW3 and PW4 gave the complaint against her.

38. The plea of the accused, as stated above, is not at all convincing. No evidence was adduced by the accused to prove the aforesaid plea. Nothing was also brought out in the cross-examination of PW3 and PW4 to show that the plea of the accused is at least probable.

39. On the other hand, there are circumstances to show that the plea of the accused is highly improbable. If PW3 and PW4 had really made applications for taking advance from the GPF account to raise money for giving loan to the accused and if withdrawal of amount from their GPF account was made for that purpose, monthly repayment of the amount in instalments by PW3 and PW4 in the GPF accounts should have been made by them. This should have been made by the accused by recovering the amount from their salary from the next month onwards. No such recovery was effected by the accused, who was the drawing and disbursing officer. It was the reason for the ignorance of PW3 and PW4 about the withdrawal of the amount from their GPF accounts till they received the GPF statement from the Accountant General. Further, if the amount was withdrawn by the accused on the basis of the applications made by PW3 and PW4, there was no reason why payment of such amount to PW3 and PW4 was not officially recorded in the acquittance roll. Further, there is no reason to disbelieve the evidence of PW3 and PW4 that they had not given any application for sanctioning advance from their GPF accounts. The evidence of PW7 would also show that no such application was seen in the GPF files kept in the school.

40. Learned counsel for the appellant contended that, Ext.P23 F.I.R was registered only on 12.01.2010 and there was inordinate delay in the registration of the F.I.R which remains unexplained and therefore, the prosecution case is not believable. There is no merit in this contention. The defalcation of the amount made by the accused came to the notice of PW3 and PW4 only when they received the GPF statement from the Accountant General in January or February in the year 2008. Thereafter, they had contacted the accused and then the accused had promised that she would give them the amount withdrawn by her from the GPF account. It is only quite natural that then PW3 and PW4, the teachers who had worked along with the accused, did not then want to give any complaint against the accused and that they waited for some time expecting that the accused would pay the amount to them. It was when the accused did not pay the amount to them that they made complaint to their superior officers. PW3 and PW4 made the complaint against the accused on 04.03.2008. When the complaint was made, a departmental enquiry was conducted by the superior officers and it was only after the departmental enquiry had progressed considerably that a complaint was made to the Director of Vigilance and Anti-Corruption Bureau (VACB) regarding the matter. After receiving the complaint, a preliminary enquiry was conducted by the VACB. It was only thereafter Ext.P23

F.I.R was registered. This explains the delay in the registration of the F.I.R.

41. Learned counsel for the appellant contended that the judgment of the trial court is based purely on inferences. This submission is not fully correct. It is true that the trial court has made certain inferences. The trial court can make inferences on proved facts. It is permissible under Section 114 of the Indian Evidence Act.

42. Learned counsel for the appellant would contend that it was only a loan transaction between the accused and PW3 and PW4. Evidence is in abundance in the case to show otherwise.

43. To summarise, Exts.P10 and P12 documents would show that the accused had prepared treasury bill for withdrawal of Rs.24,960/- each from the GPF account of PW3 and PW4 and presented the bill in the treasury and encashed the pay order cheque issued to her from the treasury, through the bank. Absence of necessary entries in Ext.P9 acquittance roll would show that the amount was not paid to PW3 or PW4 by the accused. Further, the evidence of PW3 and PW4 would show that they had not made any application for sanctioning loan from the GPF account. Their evidence would also show that the accused admitted to them that it was she who had withdrawn the amount from their GPF account. Therefore, the prosecution has proved beyond reasonable doubt that the accused dishonestly and fraudulently and abusing her official position as a public servant, withdrew a total amount of Rs.49,920/- from the GPF accounts of PW3 and PW4 by illegal means and that she misappropriated that amount.

44. In order to attract the offence under Section 13(1)(c) of the Act, misappropriation or conversion of property to his own use, if any entrusted with a public servant or which is under the control of a public servant is necessary. In the instant case, when the accused encashed Ext.P12 pay order cheque and received the amount of Rs.49,920/- from the bank, the money which belonged to PW3 and PW4, was under her control. She did not pay the amount to PW3 and PW4 and thus, misappropriated it. The accused also abused her official position as a headmistress of the school and by illegal means obtained pecuniary advantage.

45. No contention has been raised by the learned counsel for the appellant that the aforesaid acts of the accused would not constitute the ingredients of the offences punishable under Sections 13(1)(c) and 13(1)(d) read with 13(2) of the Act.

46. However, learned counsel for the appellant contended that, since the accused paid the amount to PW3 and PW4 subsequently, the offence, if any, committed by her has been undone. There is no merit in this contention. The fact that the accused refunded the amount, when the act of defalcation came to be discovered, does not absolve her of the offences committed by her (See Vishwa Nath v. State : AIR 1983 SC 174).

47. Section 13(2) of the Act (as it stood at the relevant time) stipulated that a public servant, who commits criminal misconduct, shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine.

48. When minimum sentence is prescribed for an offence by the statute, the Court has no power to impose a sentence which is less than the minimum prescribed, unless there is provision made in the statute itself enabling the court to do so (See Panduranga v. State of Karnataka : AIR 2013 SC 2164 and Shantilalmeena v. State : AIR 2015 SC 2678).

49. The trial court has sentenced the accused to undergo rigorous imprisonment for a period of two years each and to pay a fine of Rs.10,000/- each for the offences punishable under Sections 13(1) (c) and 13(1)(d) read with 13(2) of the Act. The appellant/accused is now aged about 65 years. She paid the defalcated amount to PW3 and PW4, though at a belated point of time. Considering these aspects, I find that the sentence of imprisonment imposed on the accused by the trial court can be reduced to the minimum prescribed for the offences, that is, imprisonment for a period of one year. There is no sufficient ground to reduce the sentence of fine imposed on the accused by the trial court.

50. Consequently, the appeal is allowed in part. Conviction of the appellant/accused for the offences under Sections 13(1)(c) and 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988 by the trial court is confirmed. The substantive sentence of imprisonment imposed on the accused/appellant by the trial court is modified and reduced to rigorous imprisonment for a period of one year each for the offences under Sections 13(1)(c) and 13(1)(d) read with 13(2) of the Act. The sentence of fine and the default sentence of imprisonment imposed on the accused/appellant by the trial court is confirmed. The substantive sentences of imprisonment imposed on the accused/appellant shall run concurrently.