
(2011) 06 KL CK 0009
In the High Court Of Kerala
Case No : Criminal A. No. 1537 of 2004

O.P. Balachandra Kaimal

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 22-06-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313(1)(b)
Penal Code, 1860 (IPC) — Section 403, 405, 409, 477A, 477A
Prevention of Corruption Act, 1988 — Section 13, 13(1), 13(1)(c), 13(1)(d), 13(2)

Citation : (2011) 3 KLJ 575

Hon'ble Judges : P.S. Gopinathan, J

Bench : Single Bench

Advocate : K.P. Dandapani S.r, for the Appellant; I.V. Pramod P.P., for the Respondent

Final Decision : Dismissed

Judgement

P.S. Gopinathan, J.—The Enquiry Commissioner and Special Judge, Kozhikode by judgment dated 26.8.2004 in C.C. No. 13/2000 on his file found the appellant guilty for offence u/s 13(2) read with 13(1)(c) of the Prevention of Corruption Act (hereinafter referred to as "PC Act") and 409 IPC. Consequently, he was convicted and sentenced to simple imprisonment for one year and a fine of Rs. 10,000/- on each count with a default sentence of simple imprisonment for a further period of three months. Assailing the above conviction and sentence, this appeal was preferred. PW15, the Deputy Superintendent of Police, Vigilance and Anti Corruption Bureau, Malappuram filed the charge sheet (final report) against the appellant alleging offences u/s 13(2) read with 13(1)(c) and 13(1)(d) of PC Act and Sections 409 and 477A IPC with an allegation that the appellant was working as a Mileage Officer in Velinyancode Village from 20.10.1989 to 10.8.1994 and that on 18.7.1994 when PW1, the then Revenue Inspector, inspected the office of the appellant it was noticed that the appellant had failed to remit Rs. 15,683/- collected by him towards basic tax, building tax, sales tax, amounts realised in revenue recovery proceedings etc. Ext. P2(a) is the report in

Ext. P2 Inspection Register. The matter was reported to superior authorities. On 30.7.2004, PW1 again inspected. Then also it was found that there was failure to remit the amount. As on that date, there was a sum of Rs. 23,426/- to be remitted in Treasury. Ext. P3(a) is the report. In pursuance to that report, a complaint was lodged before the Perumbadappu Police Station, following which a case as Crime No. 64/94 was registered. Subsequently, the first information report and the connected records were forwarded to the Vigilance Police Station, Malappuram on the basis of which, PW14, then Deputy Superintendent of Police, re-registered a case as Crime No. 4/95 for which Ext. P18 First, Information Report for offence under Sections 409 and 403 IPC and Section 13(1)(c) read with 13(2) of the PC Act was prepared. PW14 took over the investigation. He was succeeded by PW15, who completed the investigation and laid the charge sheet before the learned Special Judge.

2. The learned Special Judge took cognizance and issued process responding to which the appellant entered appearance. After furnishing the copy of the final report and the connected records, either side was heard. On finding that there are materials to send the appellant for trial, charge for offence u/s 13(2) read with 13(1)(c) and 13(1)(d) of the PC Act and Sections 409 and 477 A IPC (was framed. The appellant pleaded not guilty. Hence he was sent for trial. On the side of the prosecution, PWs 1 to 15 were examined. Exts. P1 to P22 and X1 to X4 were marked. After closing the evidence for the prosecution, the appellant was questioned u/s 313(1) (b) of the Code of Criminal Procedure. The appellant admitted his official status. The inspection by PW1 was also admitted. But he took a defence that there was no misappropriation or any irregularity. In a separate statement, it was stated that PW1 had not enquired about physical cash balance on 18.7.1994. He was not aware of the existence of any law or rule, which mandates the remittance of the revenue collection in Treasury on a particular day. But he had been remitting the revenue collection in Treasury as a precedent and on occasions, reasons beyond the control of the appellant, there was some delay. Though the appellant requested the Revenue Inspector and the Tahsildar to permit him to remit the amount, the Revenue Inspector stated that permission of the Tahsildar had to be obtained and the Tahsildar stated that permission of the Collector had to be obtained. Later, he fell ill and could not report for duty. Though he applied for leave, absence was recorded and he was reported absconding. Thereafter, as permitted by the District Collector, the amount was remitted in Treasury and there was no loss to the State at all. No defence evidence was let in. The learned Special Judge on appraisal of the evidence found against the appellant as stated earlier. Offences u/s 477A IPC and 13(2) read with 13(1)(d) were found not proved.

3. PW1 had deposed that during 1993-94, the appellant was working as Village Officer in Veliyancode Village Office. PW2, the successor of the appellant, PW7, a clerk attached to Ponnani Taluk Office and PW8, the Village Assistant also had given evidence that the appellant was working as Village Officer. Their evidence was not at all assailed in cross-examination. Not only the above evidence was

not disputed but also the appellant admitted that he was working as Village Officer. In the above circumstance, I find that the lower court had, on appraisal of the above evidence, rightly arrived at a conclusion that the appellant was working as Village Officer in Veliyancode Village and as such he would be a Public Servant coming u/s 2(c) of the PC Act.

4. PW10, then Commissioner of Land Revenue, would depose that after verifying the investigation report and the connected documents he issued Ext. P13 order according sanction to prosecute the appellant. Ext. P13 order was also not assailed by the appellant. Therefore, I find that the appellant was prosecuted with due sanction.

5. PW1, the Revenue Inspector, would depose that on 18.7.1994 and 30.7.1994 he inspected the Village Office, Veliyancode and found that the appellant had failed to remit the revenue collections in the Sub Treasury. PW1 would further depose that collections upto 14th of every month should be remitted in Treasury on 15th hand the collections thereafter should be remitted on the last day of the month. That evidence of PW1 was not at all disputed. Ext. P2(a) report was also not assailed by the appellant. The inspection was recorded in Ext. P1 cash book. On 18.7.1994, PW1 noted the failure to deposit the revenue collection till 15.7.1994. On 30.7.1994 also PW1 noticed that the appellant had not remitted the amount in Treasury. Ext. P3(a) is the report sent by him to the Tahsildar. Exts. P4 and P5 were identified as the receipt books maintained in the Village Office.

6. PW2, who succeeded the appellant, proved Ext. P6 attendance register. Exts. X1 and X2 are the countersign registers maintained in the Taluk Office. Ext. X3 is the cash book for the period from 6.2.1995 to 23.5.1995. PWs 3 and 4, two land owners, were examined by the prosecution to depose that they had remitted Rs. 37 and Rs. 6 respectively towards tax as evidenced by Exts. P4 (a) and P4(b) receipts and that it was acknowledged by the appellant. PW5, a defaulter to South Indian Bank, Veliyancode Branch, was examined to prove that revenue recovery proceedings were initiated against him and on 2.7.1994 he remitted a sum of Rs. 1,202/- and got Ext. P7 receipt and that the appellant acknowledged the amount and issued the receipt. PW6 is an extra departmental employee in the Postal Department. Against PW6 also there was revenue recovery proceedings and on 4.7.1994, she had remitted Rs. 1,670/-, for which Ext. P4(c) receipt was issued by the appellant in acknowledgment of the amount. PW7, a clerk attached to the Ponnani Taluk Office, was examined to depose that in pursuance to Ext. P3(c) application filed by the appellant on 16.3.1995 before the District Collector, Ext. P3(b) order dated 29.3.1995 was issued by the District Collector and following that the appellant remitted the amount. PW8, the Village Assistant was examined to prove that the amounts collected towards land tax, bank loan, housing loan etc. on every day would be entrusted to the Village Officer. PW9 was examined to depose that by Ext. P2 pay-in-slip Rs. 803 was deposited by the Tahsildar, Ponnani, on CrI. A. No. 1537/2004 8 17.5.1995 in the

District Co-operative Bank, Malappuram. PW11, the Sub Treasury Officer, Ponnani, was examined to prove Ext. P8 TR-5 receipt and Exts. P15 and P16 subsidiary registers. PW12, the Sales Tax Officer, was examined to prove Ext. P17 series challan receipts. PW13, the Deputy Tahsildar, was examined to prove that a complaint was forwarded to the police against the appellant.

7. The learned counsel for the appellant fairly conceded that the appellant was duty bound to deposit the revenue collections as deposed by PW1 and that there was failure on the side of the appellant to remit the amount. According to the learned counsel, the appellant fell ill and thereby he could not remit the amount. After recovery, though the appellant sought permission to remit the amount, the Tahsildar declined. Therefore, he had to approach the District Collector and under the orders of the District Collector the amount was deposited and no loss was sustained to the Government. It was further submitted that the prosecution had not succeeded to establish any fraudulent or dishonest misappropriation of the revenue collected by the appellant. Therefore, according to the learned counsel, no offence against the appellant was established.

8. Clause 104 of the Village Manual mandates that in the event the revenue collection does not exceed Rs. 5,000/-, the amount so collected should be deposited in Treasury by two times in a month. In the event, the revenue collection exceeded Rs. 5,000/- it should be remitted immediately in the Treasury and for no good reason the amount could be kept in hand. According to PW1, the revenue collection upto 14th should be remitted on 15th of every month and the revenue collection during the rest of the month should be remitted on the last day of the calendar month. The evidence of PW1 would show that the revenue collection by the appellant from the 1st July 1994 to 17th was not at all remitted till 18.7.1994 when PW1 inspected the office of the appellant. Thereafter, on 30.7.1994 also, there was no remittance. So, there is unambiguous evidence on record to show that there was failure on the side of the appellant to remit the amount. The retention of money by the appellant is against the mandate of the Manual. The explanation of the appellant that he was not aware that there was any rule mandating to remit the amount in treasury is devoid of bonafides. There is no case that he was a new recruit. He had got sufficient experience and was expected to be aware of the mandate of the manual. Even if he was not aware that is not an excuse. "Ignorantia juris non excusat" - ignorance of law is not an excuse. Relying upon Page Nos. 61,63 and 65 of Ext. X4, the learned counsel for the appellant submitted that the appellant was laid up due to Sarvangavatha. The medical certificate contained in page 61 would show that an Ayurvedic Physician had advised the appellant to be absent from duty for a period of four months from 29.11.1994. The medical certificate contained in Page No. 63 would show that there was advice for rest for a period of four months with effect from 29.7.1994. The fitness certificate contained in Page 65 would show that on 14.3.1995 the appellant was certified to be fit to report for duty. Other than these three documents, there is nothing on record to show that the appellant was anyway prevented from remitting the amount in sub treasury. The certificate

mentioned earlier would not show that as on the date of inspection by PW1, the appellant was anyway disabled to attend the office or to remit the amount. The alleged ailment is only from 29.7.1994. From the certificates it didn't appear that the appellant was either bedridden or that there was any serious illness. It appears that the certificates are purchased to make documents. Plea of ailment is not an acceptable explanation for non remittance. So, there is sufficient material on record to show that there is failure on the side of the appellant to remit the revenue collection in sub treasury as mandated by clause 104 of Village Manual and as per the practice spoken by PW1. The question then comes to for adjudications is whether that failure would amount to either an offence u/s 13(2) read with 13(1)(c) or u/s 409 IPC.

9. A reading of Section 13 of the PC Act would show at a public servant is said to commit the offence of criminal misconduct if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as public servant or allows any other person so to do. A reading of Section "405 IPC with illustration (e) under Explanation 2 would show that if a Revenue Officer is entrusted with public money and is either directed by law or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds and he dishonestly appropriates the money, he is said commit criminal breach of trust. According to the learned counsel for the appellant, there is no evidence on record to come to a conclusion that the appellant had either dishonestly appropriated the amount or converted the same for his use. It is true that there is no evidence to what was done with the amount. But it is pertinent to note that the appellant has no explanation as to what he had done with the money or what prevented the appellant from remitting the same on 15.7.1994 or on 30.7.1994. Though there is no evidence to come to a conclusion that PW1 had physically verified the cash balance and that there was no physical balance, the failure of the appellant to remit the amount atleast within one or two days after the inspection would persuade me to arrive at a conclusion that the appellant was not physically possessing the revenue collected by him in the capacity as a Village Officer. Though the appellant has got a case that he was laid up and applied for leave, as there is no supporting evidence to conclude that he was bedridden, even if he had some ailment, he could have handed over the money to the next subordinate and got remitted the amount in treasury. But had not done. The appellant has no case that at any time he bad sent the chalan to the Tahsildar for countersignature to remit the money in treasury though he alleged that the Tahsildar didn't permit. No permission of Tahsildar is required to remit the amount, but only a countersignature in chalan alone is required. Since the appellant had never submitted any chalan to remit the amount, it had to be inferred that there wasn't any offer to remit the amount till he made Ext. P3(c) application to the District Collector on 16.3.1995. Therefore, it goes without saying that he had been appropriating the money till that date. Dishonest appropriation is evident.

10. In support of the argument that to establish a criminal misconduct u/s 13(1) (c) the prosecution must prove that the public servant had dishonestly or fraudulently misappropriated or otherwise converted the public money to his own use, the learned counsel for the appellant relied upon the decision reported in *Mir Nagvi Askari v. CBI*, (2009) 15 SCC 6431 at paragraph 155 it is held as follows:

155. The ingredients of clause (c) of the said section are that the public servant must dishonestly or fraudulently misappropriate or otherwise convert to his own use or allow any other person to misappropriate or otherwise convert for his own use any property. Such property must have been entrusted to such public servant or must be in the alternative under his control as a public servant. Further, such conversion or misappropriation must be done with a dishonest or fraudulent intention. If the said three conditions have been satisfied then the public servant would be guilty of an offence under clause (c) of section 13(1). That is to say that if there is a dishonest or fraudulent intention on the part of a public servant and he with that intention misappropriates or otherwise converts for his own use or allows anyone else to misappropriate or otherwise convert for his own use, any property which has been entrusted to him or is under his control as a public servant."

The learned counsel also had canvassed My attention to a decision reported in *Radha Pisharassiar Amma Vs. State of Kerala*, . At paragraph 16, it is held

Again for an offence u/s 409 it must be proved that the person entrusted the property, or any dominion over the property in his capacity as a public servant committed criminal breach of trust in respect of such property as defined in Section 405 IPC. The evidence must show that he dishonestly misappropriated or converted his own use that property or dishonestly used or dispossessed that property in violation of any direction of law prescribing the mode in which such trust is to be discharged."

Paragraph 36 of the decision in *R. Sai Bharathi v. Jayalalitha*, AIR 2004 SC 692 which reads as follows was also brought to my notice by the learned counsel appearing for the appellant.

36. Offence u/s 13(1)(c) of the Prevention of Corruption Act would arise if any public servant dishonestly or fraudulently misappropriated or otherwise converted for his own use any property entrusted to him or under his control as a public servant or allowed any other person to do so. In the present case, it cannot be said that the accused acted dishonestly because there was no wrongful gain or wrongful loss and hence it cannot be said that they acted fraudulently. It cannot also be said that the accused has converted the property of TANSI inasmuch as property was sold pursuant to a transparent tender process which is not shown to be vitiated in any manner. The property in question belonged to TANSI a Government Company and it was neither trust property nor was it entrusted to or under the control of the Chief Minister or any Minister. Hence, Section 13(1)(c) of the Prevention of Corruption Act is not attracted to the facts

of the case."

11. The learned Government Pleader, on the other hand, submitted that the failure of the appellant to remit the revenue collection either on the day fixed for remittance or within a reasonable time is more than sufficient to find fraudulent and dishonest intention on the part of the appellant. It was also submitted that the failure to remit the amount for a pretty long time would also canvass a presumption that it was appropriated by the appellant for his own use. Therefore, according to the learned Government Pleader, the evidence on record is more than sufficient to come to a conclusion that the appellant had appropriated the revenue collection for his use. Therefore, fraudulent and dishonest intention is evident and it would come within the purview of criminal misconduct and criminal breach of trust as defined u/s 13 of the PC Act and Section 405 IPC. I had anxiously gone through the evidence on record and the defence version as well as the conduct of the appellant. As I mentioned earlier, the appellant could have remitted the amount in Treasury immediately after the inspection by PW1 and sending a report to the higher authorities within a reasonable period. On the other hand, he applied for leave without handing over the money. In the event, such leave was declined, the authority was right in declining the leave. Leave applied appears to be with intent to protract the deposit. I find that the prosecution had succeeded to establish dishonest and fraudulent intention on the side of the appellant for not remitting the revenue collected. He had converted the same for his use. Or else, he would have remitted the amount at least soon after the 2nd inspection by PW1. Offences u/s 13(2) read with 13(1)(c) of PC Act and Section 409 IPC are well established. The conviction is based upon cogent evidence. No interference is warranted. The sentence awarded is only the minimum prescribed u/s 13(2) of the PC Act. Relying upon paragraph 10 of the decision in *Mohiuddin v. State of Maharashtra*, (1995) 3 SCC 567 it was submitted by the learned counsel for the appellant that the agony that the appellant had undergone during the long period of criminal proceedings and that he has lost his job and has a large family to support are good reasons for reducing the sentence. In that case, it is seen that the sentence was reduced to the imprisonment already undergone. How long the appellant therein had undergone imprisonment is not disclosed. Here, the appellant had not undergone any sentence. What is the size of the family of the appellant herein, there is no evidence. Whether the appellant had lost his job is also not born out by any record. Therefore, for that reason, there can be no deviation from the minimum sentence. In the light of the decision in *Madhukar Bhaskarrao Joshi v. State of Maharashtra*, AIR 2001 SC 147 I find that the pendency of the criminal proceeding for a long time is not a special ground for reducing the minimum sentence. I find no reason to interfere with the sentence also. The learned counsel for the appellant also submitted that the appellant had remitted the misappropriated amount with 14% interest in March, 1995. Therefore, the learned counsel canvassing attention to Section 16 of the PC Act sought for deleting the fine awarded by the trial court. The subsequent remittance of the

money misappropriated is not at all a reason to delete the fine as such, though it may be a good ground in determining the quantum. Taking note of the amount misappropriated, I find that the fine imposed by the trial court is not at all exorbitant and requires no modification.

In the result, the appeal fails and accordingly, it is dismissed.