
(2007) 05 OHC CK 0023
In the Orissa High Court

Rama Krishna Sahu and Manoranjan Purohit	APPELLANT
Vs	
State of Orissa	RESPONDENT

Date of Decision : 18-05-2007

Acts Referred:

Penal Code, 1860 (IPC) — Section 109, 161, 409, 467
Prevention of Corruption Act, 1988 — Section 5

Citation : (2007) CLT 911 (Suppl CrI) : (2007) 2 OLR 104

Hon'ble Judges : R.N. Biswal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R.N. Biswal, J.—Both the appeals having been arisen out of a common judgment, the same were heard together and a common judgment is passed thereon.

2. The Appellants call in question the judgment and order dated 20.6.1995 passed by the Special Judge (Vigilance), Sambalpur in T.R. Case No. 13 of 1988 convicting the accused-Appellant Ramakrushna Sahu for the offence u/s 5(2) read with Section 5(1)(c)/5(1)(d) of the Prevention of Corruption Act, 1947 (hereinafter referred to as "the P.C. Act") and Sections 409/467 of IPC and sentencing him to undergo R.I. for three years on each count and convicting Appellant Manoranjan Purohit u/s 5(2) read with Section 5(1)(c)/5(1)(d) of the P.C. Act and Sections 409/467/109 of IPC and sentencing him to undergo imprisonment for one year on each count.

3. Shorn of unnecessary details the case of the prosecution is that Rama Krushna Sahu (hereinafter referred to as Appellant No. 1) while serving as Industries Promotion Officer (I.P.C. in short) of Dhankauda Block under Sambalpur district, was also in charge of the office of Managing Director, Dhankauda Tile making Co-operative Society (in short "the Co-Operative Society") from 15.5.1985 to 8.8.1985, while Manoranjan Purohit (hereinafter referred to as "Appellant No. 2") was Accountant of the said Society during that time. On 3.6.1985 one voucher bearing No. 960 was prepared by Appellant No. 2 showing purchase of three

truck load of bricks at the rate of Rs. 800/- per truck and to have been carried by the truck bearing registration Number ORS 9398 being driven by its driver Dinabandhu Sahu, and it was passed by Appellant No. 1. But during enquiry it was ascertained that there was no such purchase of bricks on that date and as such there was no question of transportation of any brick to the Society by truck bearing registration number ORS 9398 being driven by Dinabandhu Sahu. Appellant No. 1 forged vouher No. 960 and misappropriated an amount of Rs. 2400/- by falsification of official records being abetted by Appellant No. 2. It is the further case of prosecution that Appellant No. 2, while taking charge of Managing Director of the Co-operative Society from his predecessor Sri D.R. Mund (P.W.4), received a stock of 26345 M.Ts. of coal on 15.5.1985 and utilized 15700 M.Ts. of coal during his incumbency as such, so he should have given charge of the balance of 10645 M.Ts. of coal to his successor Sri J.B. Chand (P.W.3), but he sold away the same at the rate of Rs. 300/- per Metric Ton and misappropriated the sale proceeds amounting to Rs. 3204.15.

4. On these allegations Bipin Bihari Das, Inspector of Police (Vigilance), Sadar Squad, Sambalpur (P.W.5) lodged a written report before the Superintendent of Police (Vigilance), Northern Division, Sambalpur and being directed by him took up investigation of the case. In course of investigation he examined the witnesses, seized the relevant registers and documents from the Co-Operative Society, prepared seizure list under Ext. 7, produced the consolidated report of his investigation and the relevant papers before the Director of Industries, Orissa (P.W.6) for necessary sanction, arrested both the Appellants, released them on bail and after completion of investigation submitted charge sheet under the aforesaid sections against them.

5. The plea of the Appellants was complete denial of their involvement in the crime in question. It was the further plea of Appellant No. 1 that whatever stock he took charge of from his predecessor and the stock he purchased were exhausted in manufacturing of tiles in the factory.

6. In order to prove its case prosecution examined six witnesses as against none by the defence. After assessing the evidence on record the Special Judge (Vigilance), Sambalpur held that Appellant No. 1 forged the voucher in question and sold away the balance stock 10645 M.Ts. of coal at the rate of Rs. 300/- per Metric Ton and misappropriated the sale proceeds being abetted by Appellant No. 2 and as such, convicted them for the offences they were charged with and sentenced them thereunder as mentioned earlier.

Being aggrieved by the said order of conviction and sentence, the Appellants have preferred the present appeals separately.

7. At the out-set learned Counsel appearing for Appellant No. 1 submitted that in the capacity of Managing Director of the Co-Operative Society, Appellant No. 1 was alleged to have committed the offences in question. The said Co-Operative Society having not been created by any statute cannot be said a Corporation

established by or under an Act of the Central or State Legislature. Appellant No. 1 while discharging the function of the Managing Director of the Co-Operative Society was not a public servant and as such he cannot be liable under any penal provision of P.C. Act. In support of his submission he relied on the decisions in S.S. Dhanoa v. Municipal Corporation, Delhi and Ors. 1981 SC 1395 and Yeshwant and Others Vs. The State of Maharashtra, . In the decision S.S. Dhanoa (supra) the Apex Court held that a Co-Operative Society is not a statutory body, because it is not created by a statute. It is a body created by an act of a group of individuals in accordance with the provision of a statute. So a Government employee working on deputation in a Co-Operative Society cannot be said a public servant. In the decision State of Gujarat (supra) Manshankar Dwivedi was a Lecturer in a Government College. It was alleged that while he was being appointed as an examiner under Gujarat University, he accepted illegal gratification of Rs. 500/- for showing undue favour to a candidate and as such was charged u/s 5(2) of P.C. Act read with Section 161 of IPC. The Apex Court held that as Dwivedi was not a public servant while he was acting as an examiner, it could not be said that there had been any abuse by him of his position as a public servant. It was never the case of the prosecution that he had been guilty of any abuse of his position as a Lecturer of the Government College. Accordingly he was acquitted of the charges.

8. Learned Addl. Standing Counsel conceded that an employee of a Co-Operative Society or a public servant working on deputation in a Co-Operative Society is not a public servant. But in the case at hand Appellant No. 1 who was an I.P.C. and as such a public servant, was not an employee under the Co-operative Society nor he was deputed there. He was kept in dual charge of I.P.C. and Managing Director of the Co-Operative Society. In the decision State of Gujarat (supra) Dwivedi was a Lecturer of a Government College and he was appointed by Gujarat University as examiner to value the answer scripts and it was alleged that in the capacity of examiner he obtained illegal gratification. He was appointed as an examiner, not because he was a lecturer in a Government College, but because of his qualification. But here in the present case Appellant No. 1 was kept in charge of Managing Director since he was I.P.C. of Dhankauda Block. So, the decisions cited above cannot be applicable to the present case. Accordingly learned Addl. Standing Counsel urged that the argument advanced by learned Counsel for Appellant No. 1 ought not to be accepted.

No doubt Appellant No. 1 was in dual charge of I. P.O. and Managing Director of the Co-Operative Society. But there is nothing in the evidence on record to show that an I.P.C. alone can remain in charge of the Managing Director of the Co-Operative Society. In other words, there is no evidence indicating that no one other than an I.P.C. can remain in charge of the Managing Director of the Co-Operative Society. So Appellant No. 1 cannot be liable for the offence u/s 5(2) read with Section 5(1)(c) and 5(1)(d) of the P.C. Act.

9. With regard to the offence u/s 409 of IPC, it transpires from the evidence of

P.W.2, the Inspector of Co-Operative Societies, Audit, Bargarh that he audited the Co-Operative Society, for the period 3.2.1986 to 12.3.1986, during which time Appellant No. 1 was in charge of Managing Director thereof. After conducting a detailed audit and perusing the entry in the Stock Register and making physical verification of the stock, he came to know that there was shortage of sand, worth Rs. 100/-, coal worth Rs. 3110.32 and bricks worth Rs. 2400/- and dead stock of Rs. 280/-. Learned Counsel for the Appellant No. 1 submitted that the audit report itself would not be sufficient to bring home the charge of misappropriation. In support of his submission he relied on the decision in the case of State of Orissa Vs. Shyamsundar Rath and Another, where it has been held by this Court that entries in the books of account, though relevant, would not alone be sufficient evidence to charge any person with criminal misappropriation. But in the present case/besides the audit report witnesses have been examined to establish the charge levelled u/s 409 of IPC against the Appellant No. 1. So the decision cited above cannot be applicable to the present case.

10. It transpires from the evidence of P.W.3, the successor of Appellant No. 1 that he took over charge from Appellant No. 1 and the taking over continued for three months and the charge list was finally prepared and signed on 21.11.1985 as per Ext. 2. By the time he took over charge on 21.11.1985 there was no stock of coal or bricks in the Co-Operative Society. During cross-examination it was elicited from him that various raw materials, like coal and bricks were necessary for the purpose of manufacturing tiles and it was recurring process. The tile factory was running and tiles were being manufactured during the period 5.8.1985 to 21.11.1985. He further stated that the Stock Mistry-Dolagovinda Barad, who was in charge of making tiles, was competent to say that quantity of brick and coal used during the relevant period. So Mr. Mund, learned Counsel for the Appellant No. 1 submitted that there was no evidence as to what exactly was the physical stock of bricks and coal on 5.8.1985, when Appellant No. 1 ceased to be the Managing Director of the Co-Operative Society and the quality of bricks and coal used for manufacturing of tiles during the period 5.8.1985 to 21.11.1985. Admittedly there is no evidence to show the stock of bricks and coal on 5.8.1985 when Appellant No. 1 ceased to be the Managing Director of the Co-Operative Society. Dolagovinda Barad, the Stock Mistry was the competent person say about the quantity of bricks and coal used in manufacturing of tiles during the period 5.8.1985 to 21.11.1985, but his examination was withheld for the reasons best known to the prosecution. Learned trial Court in this respect held that it was the duty of the Appellants to examine Dolagovind Barad to prove that the balance stock of bricks and coal were in fact used for the manufacturing of tiles during the period 5.8.1985 to 21.11.1985 which was erroneous. Burden of proof of establishing all the ingredients of Section 409 of IPC such as entrustment, misappropriation, dishonest intention etc. lies on the prosecution. In the present case, it was for the prosecution to prove that the stock in question was misappropriated by the Appellant No. 1. It was not the duty of said Appellant

to prove his innocence. When prosecution failed to prove that the Appellant No. 1 misappropriated the stock, the trial Court ought not have convicted him for the offence u/s 409 of IPC, particularly when it was his plea that the stock of bricks and coal was exhausted in manufacturing tiles during the period 5.8.1985 to 21.11.1985, which could not be disproved.

11. As regards the offence u/s 467 of IPC, it transpires from the evidence of P.W. 1, the owner of the truck bearing registration number ORS 9398 that Dinabandhu Sahu was never a driver of the said truck and that he never transported bricks in his truck. He specifically deposed that he did not transport any brick to the Co-Operative Society. He further stated that sometimes he accompanied the truck to different places. Whenever he was not in the truck and payment was made towards hire charge, his staffs used to receive the same and subsequently pay it to him. During cross-examination he failed to say the name of the drivers engaged by him in the said truck in different years. He also failed to say on which date his truck carried what goods and to which places. So, learned Counsel for Appellant No. 1 submitted that when P.W.1 was unable to say as to on which date his truck carried what goods and to which places and as per his evidence when he sometimes receives hire charge from his staff, the possibility that the truck in question was used in carrying the bricks without his knowledge, cannot be ruled out. Similarly when he failed to name the different drivers engaged in his truck in different years, his evidence that Dinabandhu Sahu was never his driver, cannot be accepted, particularly when the latter was not examined. Learned Addl. Standing Counsel in this context submitted that the whereabouts of Dinabandhu Sahu could not be ascertained, which shows that it was fictitious name. But there is nothing in the evidence of P.W.5, the I.O. to show that he made any attempt to search for said Dinabandhu Sahu. Moreover it can be judicially noticed that Dinabandhu Sahu is a common name and it does not inspire confidence that no person bearing the name Dinabandhu Sahu could be traced out in Sambalpur. So, it also casts a doubt as to whether the voucher, Ext. 4 was a genuine or a forged one. Accordingly, it is held that prosecution failed to establish the offence u/s 467 of IPC against Appellant No. 1 to the hilt. When prosecution failed to prop up the charge under Sections 5(2) read with Section 5(1)(c) and 5(1)(d) of P.C. Act and Section 409/467 of IPC against the Appellant No. 1, Appellant No. 2 cannot be held guilty u/s 5(2) read with Section 5(1)(c)/5(1)(d) of P.C. Act and Section 409/467 of IPC all read with Section 109 of IPC. The trial Court without considering the evidence on record in its true perspective convicted the Appellants under the Sections they were charged with erroneously.

In the result, both the Criminal Appeals are allowed and the judgment and order of conviction and sentence passed by the trial Court against the Appellants in T.R. Case No. 13 of 1988 are hereby set aside.