(2011) 02 BOM CK 0018

In the Bombay High Court

Case No : Criminal Appeal No. 291 of 1997

Shabbir Mohamed Ishaque Bagwan APPELLANT

Vs

The State of Maharashtra RESPONDENT

Date of Decision : 10-02-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Prevention of Corruption Act, 1988 — Section 13, 13(1), 13(2), 7

Citation : (2011) 02 BOM CK 0018

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : Rahul S. Kate, for the Appellant; J.P. Kharge, APP., for the Respondent

Judgement

R.C. Chavan, J.—This appeal is directed against Appellant''s conviction by the learned Special Judge, Pune, for offences punishable under Sections 7 and 13(1)(d) read with 13(2) of the Prevention of Corruption Act and sentence of R.I. for three years and a fine of Rs. 1,000/-or in default to undergo further R.I. for three months, imposed upon the Appellant on each of the two counts.

2. Facts which are material for deciding this appeal are as under:

The complainant Shankar Dhumal wanted a copy of the 7xl2 extract with entry as "Vihir Padh" in respect of fields standing in the name of his father Lalasaheb. Since the complainant wanted to have electric motor pump installed and wanted to have electric connection jointly in the name of complainant''s father and his uncle, he also wanted the entry to that effect being made in the revenue record of the property. Shankar allegedly approached Appellant and the co-accused Dnyaneshwar Baburao Vaidya, who was the Circle Inspector, for this purpose on 29.11.1988. On 3rd December, 1988, the Appellant made demand of Rs. 600/- for the said work and it was reduced to Rs. 350/-and accused Dnyaneshwar Vaidya received a sum of Rs. 150/-out of that sum, sum of Rs. 75/-was allegedly received by eh Appellant on 3rd December, 1988, and balance was to be paid within a week i.e. on 10th December, 1988. On 9th December, 1988, the complainant Shankar approached to Anti Corruption Bureau. His report was taken and Anti Corruption Bureau prepared for a raid on 10th December, 1988. After calling panchas and performing of pretrial requisites, raiding party went to the office of the Appellant. The co accused Dnyaneshwar was not present at that time. The Appellant is alleged to have taken a sum of Rs. 200/-which had been smeared with anthracene powder, and kept in the drawer of his table. On the complainant''s giving pre-determined signal, raiding party rushed and found that the Appellant''s fingers glowed in the ultra violet light. Money was also taken out from the drawer by one of the panchas, who had not accompanied the complainant. Then the trap panchnama was drawn up and offence was registered.

3. On completion of investigation, the papers were sent to the Collector, who was the sanctioning authority for authorizing prosecution of the Appellant and co accused Dnyaneshwar. Upon receipt of requisite sanction from the Collector, charge sheet was sent.

4. Learned Special Judge, charged both, the Appellant and Dnyaneshwar, for the offences punishable u/s 7 and 13(1)(d) read with 13(2) of the Prevention of Corruption Act, in respect of both the the incidents dated 3rd December, 1988 and 10th December, 1988. Since both the accused pleaded not guilty to the charge, they were put on trial, at which the prosecution examined in all five witnesses in its attempt to prove their guilt.

5. Upon consideration of prosecution evidence in the light of defence of denial raised, learned Special Judge held that the prosecution had failed to prove the charge against co accused Dnyaneshwar Baburao Vaidya and proceeded to acquit him. He, however, held the Appellant guilty of offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act and convicted and sentenced the Appellant as mentioned in earlier part of the judgment.

6. Questioning the above conviction and sentence, the Appellant is before this Court.

7. I have herd learned Counsel for the Appellant and learned Additional Public Prosecutor for State.

8. With the help of both learned Counsel I have gone through the record. P.W. 1 Shankar Dhumal is the complainant who approached Anti Corruption Bureau with the complaint about demand of money by the Appellant and the co -accused. He stated that since his family wanted 7xl2 extract, in respect of their property bearing Gat No. 192, they had approached the Appellant and the co -accused. On the meeting co accused Dnyaneshwar who was stated to be sitting in the same room, the complainant asked him as to what would be the expenses for work, which was to be done. Appellant allegedly told that an amount of Rs. 600/-would be required, and after bargaining the amount was fixed at Rs. 350/-. The complainant claimed to have paid Rs. 150/-to co accused Dnyaneshwar Vaidya.

He was told that the balance would have to be paid on 10th December, 1988. P.W.5 Police Inspector Mulani, conducted raid. P.W.3 Sukhdeo Bansode, the panch, stated about the pre trap panchnama, smearing of notes with anthracene powder which the complainant was to carry. After this P.W.1 Shankar accompanied by panch witnesses P.W.3 Sukhdeo went to the office of Appellant. According to P.W.1 Shankar after purchasing tickets for Flag Day, they sought 7xl2 extract. The Appellant allegedly asked P.W.1 Shankar as to whether he had brought what was decided i.e. bribe money and then asked Shankar to hand it over to him. P.W.1 Shankar stated that as per what had been decided only Rs. 200/-were due. After Appellant asked that money should be handed over to him, money was then paid to the Appellant. P.W..3 Sukhdeo stated that the Appellant asked Shankar as to whether he had brought amount as agreed. According to P.W.3 Sukhdeo, PW.1-Shankar, then asked the Appellant how much he should give. Then the Appellant told that Rs. 200/-were due and then P.W.1 Shankar was to pay Rs. 200/-. This is the only discrepancy in the evidence of two witnesses to prove the transactions at the raid.

9. After money was paid, P.W.1 Shankar left the place and gave the signal. After receiving signal, P.W.5, Inspector, Mulani along with other pancha came to the office of Appellant. P.W.5 Police Inspector, Mulani, asked the Appellant as to where is the amount of bribe. The Appellant told that it was in the drawer of his table. P.W.5 Mulani, examined the hands of both the panchas and the Appellant under the ultra violet lamp. The hands of the Appellant glowed in ultra violet light. P.W.5 Police Inspector Mulani, states about all the steps that were taken in course of investigation including, sending the papers to P.W.4 Shrinivas Patil.

10. P.W.4, is Shriniwas Patil, was the Collector, who stated that on receipt of all papers, he accorded sanction for prosecution of both the accused persons. He stated that though his office had received papers early, sanction was accorded only after a reminder was received. He had taken the papers into consideration. A draft sanction order had also been sent along with the papers. Sanction order itself bears the seal near about the word ''seal'' i.e at the place where seal ought to have been affixed. The order does not mention the date on which it was issued. The letter whereby record was sent to P.W.4, Shriniwas Patil, for deciding whether the sanction should be accorded or not, has not been produced. Therefore, it was submitted by the learned Counsel for the Appellant that there is nothing to show that as to what Sanctioning Authority in fact considered independently while according sanction.

11. prosecution also examined one Kisan Yadu Kadam as P.W.2, to show that the complainant Shankar''s father was working with this witness and this witness had taken complainant''s father Lalasaheb to his native place on 29th November, 1988. This evidence has absolutely no bearing on the merits of the case.

12. Learned Counsel for the Appellant submits that the genesis of the incident is the deliberation which took place between Shankar and the Appellant as well as co-accused Dnyaneshwar on and before 3rd December, 1988. He submitted that

the learned trial Judge did not accept the story of Dnyaneshwar having received Rs. 150/-on 3rd rd December, 1988. Therefore, according to him, in the light of the view taken by the Hon''ble Supreme Court, in case of Hari Dev Sharma Vs. State (Delhi Administration), the learned Trial Judge, should have discarded the entire evidence. In that case, the High Court had not accepted the story about payment of Rs. 20/-holding that it would be unsafe to rely on the bare testimony of the complainant, but the Court then went on to accept the story about the accused having been caught while accepting bribe from the complainant. The Hon''ble Supreme Court observed that the main difficulty which Supreme Court felt in accepting the prosecution case arose out of the fact that the High Court disbelieved the part of prosecution case, which according to prosecution was the genesis of the case. Learned Counsel for the Appellant submits that similar is the case at hand where the learned trial Judge had rejected the evidence of P.W.1 Shankar about the incident dated 3rd December, 1988. Therefore according to learned Counsel, learned trial Judge should have rejected the entire story.

13. As rightly submitted by the learned Additional Public Prosecutor the facts of the case at hand are different from those in Hari Dev Sharma''s case (supra). In the case at hand there are two different persons who are involved in receiving bribes on two different dates. He further submitted that it is not that the trial Judge has held story about payment of Rs. 150/-to Dnyaneshwar on 3rd December, 1988 to be false. He has merely held that story could not be accepted. In any case as rightly pointed by the learned Additional Public Prosecution as far as payment and acceptance of Rs. 200/-on 10th December, 1988 is concerned, there is ample evidence of P.W. 1, Shankar, P.W.3 Sukhdeo Bansode, P.W.5, Inspector Mulani, which could not be rejected.

14. Except a small discrepancy as to who asked as to the payment, which was due in the evidence of P.W.1 Shankar and P.W.3 Sukhdeo which is negligible, the evidence of these two witnesses clearly speaks of Appellant having demanded sum of Rs. 200/-which had been smeared with anthracene powder. Evidence of P.W.3 Sukhdeo would also show that the right hand of the Appellant was examined in ultra violet lamp. It was sought to be made out in Appellant''s statement u/s 313 of Code of Criminal Procedure that when the Appellant had left his seat to open a cupboard to take out some paper, tainted money was put in the drawer and then Appellant was made to take out that money and so his hands were smeared. But curiously no such suggestion has been given to P.W.1 Shankar and P.W.3 Sukhdeo, in their cross examination. Therefore, the story about money being planted in the drawer is obviously after thought evolved in course of statement u/s 313 of Criminal Procedure Code.

15. It cannot be said that the learned trial Judge erred in concluding that the story about demand and receipt of Rs. 200/-by the Appellant had been established. Learned Counsel for the Appellant submitted that the Appellant was not having the authority to sign the mutation entry or the entry in 7xl2 extract, and it was to be signed only by the Circle Inspector. But, it is not the defence of

the Appellant that the accused Dnyandeshwar had dealt with the entire transaction and Appellant merely acted on behalf of Dnyaneshwar. According to prosecution on 9th December, 1988, both the Appellant as well as Dnyaneshwar participated in the deliberations and it appears from the evidence of Shankar that it was the Appellant who stated that an amount of Rs. 600/-will have to be paid. Therefore, whether the Appellant himself did the work or got necessary certification from his superior Dnyaneshwar is insignificant and so this argument about whether the Appellant had authority to alter 7xl2 extract has to be rejected.

16. Learned Counsel also submitted that copy of 7xl2 extract about "Vihir Padh", was to be given on 10th December, 1988, but not about share of uncle, which according to learned Counsel could have been done only by the Circle Inspector, since entry about "Vihir Padh" was already there, in the earlier revenue record. This is not significant and does not have any bearing on the fact that the applicant had demanded and received sum of Rs. 200/-.

17. Learned Counsel for the applicant next submitted that P.W.4 Shriniwas Patil-Collector, had not applied his mind to the material collected in the course of investigation and had mechanically granted sanction to prosecute the Appellant and another accused. He submitted first, that there is no record as to which documents were sent to the Collector for being considered by him and secondly the existence of the word "seal" in the sanction order would clearly show that sanction was merely copied from the draft sanction order which had been sent by Anti Corruption Bureau.

18. Both these contentions have to be rejected since there is nothing to show that no documents were placed before the Collector. Reliance by the learned Counsel for the Appellant on the judgment in case of State of Karnataka Vs. Ameer Jan, , is misplaced. In para 10 of the judgment, the Supreme Court dealt with documents which had to be considered by the sanctioning authority. The relevant portion is as follows:

For the aforementioned purpose, indisputably, application of mind on the part of the sanctioning authority is imperative. The order granting sanction must be demonstrative of the fact that there had been proper application of mind on the part of the sanctioning authority. We have noticed hereinbefore that the sanctioning authority had purported to pass the order of sanction solely on the basis of the report made by the Inspector General of Police, Karnataka Lokayukta. Even the said report has not been brought on record. Thus, whether in the said report, either in the body thereof or by annexing therewith the relevant documents, IG Police, Karnataka Lokayukta had placed on record the materials collected on investigation of the matter which would prima facie establish existence of evidence in regard to the commission of the offence by the public servant concerned is not evident. Ordinarily, before passing an order of sanction the entire records containing the material collected against the accused should be placed before the sanctioning authority. In the event, the order of sanction does not indicate application of mind as (sic to) the material placed before the said authority before the order of sanction was passed, the same may be produced before the Court to show that such material had in fact been produced.

19. When the sanction order does not indicate application of mind to the material placed before the authority before sanction was accorded, the relevant material was required to be only produced before the Court to show that such material in fact been produced. In this case, since there is nothing to show that the order depicts non application of mind, there was no reason to conclude that it was necessary to produce material which had been referred to the Sanctioning Authority. Absence of date or the printing of the word "seal" in the sanction order are not serious discrepancies, to draw the inference that the authority had not applied its mind. In view of this even after considering observations in case of Jaswant Singh Vs. The State of Punjab, , it has to be held that there is absolutely no infirmity in grant of sanction by P.W.4 Shriniwas Patil, to prosecute the Appellant. In view of foregoing observations, it cannot be held that the learned trial Judge erred in holding the Appellant guilty of offences punishable u/s 7, 13(1)(d) and Section 13(2) of the Prevention of Corruption Act.

20. earned Counsel for the Appellant submitted that even so, learned trial Judge was thoroughly unjustified in inflicting sentence of R.I. for three years on each count. He submits that offence punishable u/s 7 of the Prevention of Corruption Act attracts maximum sentence of five years and offence punishable u/s 13(1)(d) read with 13(2) attracts maximum sentence of only 7 years. He submitted that the conclusions drawn by the learned Judge while sentencing the Appellant do not reflect that learned Judge has considered mitigating factors Learned Counsel for the Appellant submits that the Appellant had unblemished service record and in fact he had been given certificate of excellence by his department. The appellant was about 32 years at the time of trap and has three daughters. He submitted that the Appellant was dismissed from service upon his conviction in the year 1997.

21. According to learned Counsel, the trial Judge should have considered the consequences emanating from the conviction, which would have been punishment enough for the Appellant. The learned APP on the other hand submits that bench mark sentence in such cases is three years of imprisonment, and there is absolutely no warrant to treat Appellant with leniency a person who had received bribe in discharge of his functions as public servant.

22. While there could be no doubt that a public servant accepting bribe need not be dealt with leniently, it cannot be forgotten that the legislature in its wisdom has fixed sentence of five years and seven years which could inflicted upon the convicts. For Section 7, the minimum sentence prescribed is six months and u/s 13 it could be one year. Unless it is shown that the case of the Appellant was of such gravity that he was not entitled to be visited with minimum sentence, there was no reason for the learned Judge to award sentence of three years. Given

nature of amount of bribe demanded as also the fact that Appellant claimed to have unblemished service record and the fact that the Appellant would be visited with punishment for an incident of the year of 1988 for which he was convicted in 1997 and has been living under the shadow of conviction for the last 14 years, at this point of time, it may be appropriate to reduce the sentence to minimum prescribed under the two provisions.

23. In view of this appeal is partly allowed. The conviction of the Appellant for the offence punishable u/s 7 and 13(1)(d) of the Prevention of Corruption Act is maintained. However, sentence of R.I. for three years is reduced to R.I. for six months for the offence punishable u/s 7 of the Act and R.I., to one year for the offence punishable u/s 13(1)(d) of the Act, maintaining the fine which has been imposed by the learned Trial Judge on both these counts. The Appellant shall surrender to his bail within a period of four weeks of the judgment being available on the High Court website and if the Appellant failed to surrender within period of four weeks, the learned Special Judge shall take necessary steps to have the Appellant arrested and committed to serve the sentence.

