(2014) 08 DEL CK 0205

In the Delhi High Court

Case No : Crl. L.P. No. 219 of 2006

State APPELLANT

Vs

R.P. Tiwari RESPONDENT

Date of Decision : 07-08-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437(A)
Prevention of Corruption Act, 1988 — Section 13(1)(d), 13(2), 7

Citation : (2014) 4 JCC 2371

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : Sanjeev Bhandari, Standing Counsel, Advocate for the Appellant; Rebecca M. John, Senior Advocate, Vishal Gosain, Harsh Bora, Rudrani Tyagi and Nikhil Ahjua, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, J.

CRL.L.P. No.219 of 2006

1. The Petitioner, Central Bureau of Investigation (''CBI)'' seeks leave to appeal against the impugned judgment dated 4th April 2006 passed by the learned Special Judge in RC No. 43(A)/99 acquitting the Respondent for the offence under Sections 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (''PC Act).

2. Leave granted. The leave petition is disposed of.

Criminal Appeal No. of 2014 (to be numbered by the Registry)

Background facts

3. The case of the prosecution is that the Respondent, R.P. Tiwari, was the Chief Resident Engineer (''CRE)'' of the Rajasthan State Bridge Construction Corporation Limited (''RSBCC),'' which had in 1997 been awarded two contracts

by the Delhi Institute of Technology (''DIT),'' Dwarka [later named as Netaji Subhash Institute of Technology (''NSIT)]'' - one for the construction of a boys hostel and staff housing and the second contract for the construction of married students hostel and faculty housing.

4. The married students wing was to be completed by 31st May 1999 and the boys hostel by 15th July 1999. Although the construction work of the boys hostel was completed by 30th July 1999, some defects were noticed. Mr. Anil Arora (DW-5), Executive Engineer of NSIT addressed a letter dated 31st July 1999 (Ex.DW-5/A) to the CRE inter alia pointing out that the work had not been done in time and was also sub-standard and that "kota stone in staircase is broken at number of places and patch work has been done which is unacceptable. The replacement and rectification is to be done." Mr. Brij Mohan Sharma,(DW-1) who was working as Additional Resident Executive Engineer in RSBCC and was posted at NSIT stated that M/s. Garg Associates of which the Complainant, Navnendra Garg (PW-5) was the proprietor had been allotted the work of steel fabrication of doors and window frames and fixing of the steel railings on staircase at boys hostel of NSIT. DW-1 stated that the work done by M/s. Garg Associates was not up to the mark because the steel railings on the staircase were supposed to be fixed before fixing of kota stones. However, PW-5 had fixed the steel railings after the kota stones were fixed. This resulted in damage to the kota stones in the staircase. The Respondent had, in the presence of DW-1, asked PW-5 to repair the damage to the kota stones. However, PW-5 refused to repair the damage. According to DW-1,since NSIT was pressuring the RSBCC to hand over the building by 31st July 1999, a petty contractor M/s. United Builders (''UB)'' was hired to repair the damages of kota stones for which UB demanded payment of Rs. 2,500 approximately. Thereafter, both CRE and DW-1 asked M/s. Garg Associates to reimburse the said payment and PW-5 promised to pay the aforementioned amount to the sub-contractor.

The complaint

5. The case of PW-5 is that he had been awarded the work of fixing the doors and windows as well as railings. While the said work was in progress, two bills of his - one was for a sum of Rs. 21,897 (Ex.PW- 4/D) and the other for Rs. 37,048.80 (Ex.PW-5/A) - both dated 11th July 1999 were pending payment. He stated that he had submitted an application to finalize these two bills. According to him, Mr. K.K. Aggarwal (PW-4), Assistant Engineer (''AE)'' had made the measurement and prepared the bill and had submitted these two bills to the office of the CRE. PW-5 further stated that the Respondent had demanded money to pass these two bills. Thereafter PW-5 met the Respondent several times in the month of August 1999 when he had repeatedly demanded a bribe of Rs. 2,500 for clearing PW-5s bills. Finally, on 1st September 1999 the Respondent again demanded and asked to be paid the bribe on the next day.

The pre-trap proceedings

6. PW-5 stated that since he decided not to pay the bribe, he went to the office of the Anti Corruption Branch (''ACB),'' CBI on 2nd September 1999 at around 9 or 9.30 am. He met Mr. H.S. Karmyal, (PW-3), Inspector of the CBI and handed over to him the written complaint dated 2nd September 1999 in which he mentioned that the said bills dated 11th July 1999 were pending with the Respondent.

7. After verifying the complaint, a trap team comprising of PW-3, Inspector P. Balachandran, Inspector Lalji Yadav and other subordinate staff of CBI was constituted. At about 2.30 pm two independent witnesses, Satvir Singh (PW-2), Vigilance Assistant of Indian Oil Corporation (''IOC)'' and Pritam Singh, (PW-1), Assistant Manager, Food Corporation of India (PW-1) were associated. PW-5 was stated to have produced 25 government currency (''GC)'' notes of Rs. 100 each. Their numbers were noted in the pre-raid proceedings. The GC notes were treated with phenolphthalein powder and a practical demonstration regarding its reaction with the sodium carbonate powder was given.

8. Thereafter, the treated GC notes were handed over to PW-5 who kept them in his left shirt pocket with the direction to hand over the same to the Respondent on his specific demand. PW-1 was asked to act as shadow witness and to listen to the conversation and also to see the transaction of bribe. He was also directed to give the pre- appointed signal by scratching his head with both hands as soon as the transaction of bribe is over.

The trap proceedings

9. At around 3.15 pm, the trap team left for the spot and at around 3.45 pm it reached near Rajasthan State Guest House at Chanakya Puri.

10. PW-5 in his evidence stated that he and PW-1 went to the office of the Respondent on the first floor where somebody was sitting in front of the Respondent. The Respondent asked him to wait for a moment. After the person sitting with the Respondent left, PW-5 and PW-1 entered the room and sat on the chair. PW-5 introduced PW-1 as his partner and told the Respondent that he needed some kind of job. The Respondent assured PW-1 that he would look into the matter. According to PW-5, he enquired from the Respondent about his bill, to which the Respondent enquired whether he had brought the money to which he replied ''Laya'' Hoon. The Respondent further enquired ''Poore'' laye ho kya to which he replied ''Poore'' hain. The Respondent again asked ''Pacheeso'' hain kya to which PW-5 replied ''Poor pacheeso'' hain. The Respondent is then stated to have asked him ''layo.'' Thereafter, PW-5 took out the GC notes from his pocket and handed them over to the Respondent who accepted them with the right hand and kept them in the right side top table drawer.

11. PW-1 thereafter went outside to give the signal and the trap team members arrived at the spot. They caught hold of the Respondents right hand after disclosing their identity and enquired about the transaction. They were informed that the money was kept in top table drawer. The GC notes were recovered by

PW-1.

12. It has come in the evidence of Mr. V.K. Verma (DW-2) that he was present when PW-5 and PW-1 had entered in the office of the Respondent. He stated that PW-5 introduced PW-1 as his friend and stated that "he was a sanitary contractor and that some work be given to him." Thereupon, PW-5 took out Rs. 2,500 and told the Respondent that "Wo Thekadar Mila Nahi Hai, Ye Uske Paise Hai, Aap Use De Dena". Thereafter DW-2 left for his office which was adjacent to that room. He stated that after 3-4 minutes he heard some noises and came to the office of the Respondent. He found that six or seven officials of the CBI were there and they were playing a pocket tape recorder kept on the table. Then those officials said to the Respondent that "he had taken bribe and that they would arrest him." In the meanwhile the other officers from the RSBCC gathered there and protested stating that "this money was given in our presence for the contractor and that this was not the bribe money."

13. In his cross-examination, DW-2 denied that a protest was made by him in writing to the Chairman or other senior officers of RSBCC regarding the arrest of the Respondent by the trap team. In his cross- examination, PW-1 stated that "it is correct that at the time R.P. Tiwari was apprehended by the CBI, the other officers of the department had protested on the ground that money was taken for some other purpose and not as a bribe."

14. The hand wash of the Respondent turned pink. Interestingly, in this case the Respondent does not deny the acceptance of money but his stand was that this was the money to be given to the sub-contractor for the repair work of the kota stone on the staircase and for this he had to be paid Rs. 2,500. It may be mentioned at this stage that PW-1 declined to identify the Respondent in the Court although he did confirm the pre-trap proceedings. He stated that PW-5 enquired about pending bill and the Respondent asked about the money which was then handed over to him. He confirmed that another officer was sitting with the Respondent. He could not recollect, if while giving money to the Respondent, PW-5 had stated "Yeh us tekedhar ke hain, ye usko de dena".

The tape recorder

15. What is significant is that PW-1 stated that CBI had handed over a micro tape recorder to PW-5 while leaving the office of CBI prior to the raid to keep in this pocket and to tape the conversation which might take place in the room at the time of raid. It must be mentioned that the tape recorder was played after the CBI entered the room. These statements were made in the PW-1s cross-examination by learned counsel for the defence. Yet there was no re-examination of this witness by the CBI on the above aspect.

16. As regards the tape recorder, DW-2 also made a pointed reference to it in his deposition. He stated that 6-7 officials from CBI were there and they were "playing a pocket tape recorder kept on the table."He was not cross-examined on this aspect.

17. The stand of the Respondent is that the non-production of the tape recorder by the CBI should lead to an adverse inference against the prosecution that if the tape recorder had been produced it would have borne out the actual conversation that took place between PW-5 and the Respondent in his room.

18. Mr. Rajiv Kumar Chandha (PW-7) who took over the investigation from PW-3 was asked about the tape recording which he brushed aside stating "depends entirely on the circumstances as to when advance technology like micro cassette tape recorder are used by us during the investigation."

No acceptance of bribe by the Respondent

19. An analysis of the above evidence does lead to the conclusion that the Respondent has been able to probabilise his defence on a preponderance of probabilities that the money received by him was not a bribe. The facts in the present case are very close to the facts in M. Abbas Vs. State of Kerala, . In that case, the accused was alleged to have demanded a sum of Rs. 200 as bribe from the Complainant for refunding the earnest money and security deposit amounting to Rs. 500 which had been deposited at the time of submission of tender for maintenance. The accused was working as an Overseer with the municipality. A trap was organized and the accused was arrested after he had received the money and put it in his shirt pocket. The evidence showed that the Contractor had completed the maintenance work and had received payment. However, it was found that he had failed to remove the bump from the road which was later on got removed through another contractor. The defence of the accused was that the amount that was paid to him was towards balance amount to be paid to the other contractor to whom Rs. 50 had allegedly been paid earlier by the Respondent himself. The Supreme Court came to the conclusion that the accused had proved his defence on a preponderance of probabilities and it was for the prosecution to have led evidence, to show that money received by the accused was not the payment for the other contractor.

20. The only distinction between the above case and the one on hand is that although Respondent No.5 did not make any part of payment to the sub-contractor, the fact remains that the defence was able to show by the evidence of Mr. Anil Arora, Executive Engineer (''EE)'' [DW-5] that they had in fact made a complaint (Ex. PW5/A) damage caused and that "I was constantly asking the CRE to get the repair work of broken kota stones at the staircase but Mr. R.P. Tiwari informed us that the Contractor is not attending the job and he will get it done through somebody else." This witness in his cross-examination was not shaken by the prosecution. In the circumstances, it must be held that the Respondent has been able to show, on a preponderance of probabilities, that money that was accepted by him was not by way of bribe but was the payment due to the sub-contractor.

Bills not yet ready for payment

21. The benefit of doubt to the Respondent is not exclusively on the above

ground. The very genesis in this case is that the bills of PW-5 dated 11th July 1999 were pending for clearance with the Respondent. The only witness examined by the prosecution from the side of RSBCC was Mr. K.K. Aggarwal (PW-4), who was at the relevant time AE of RSBCC posted at the construction project of DIT, New Delhi. He admitted in his cross-examination that "in the CRE Office, Assistant Accounts Officer, Auditors and other Accounts Officer used to examine the measurement book (''MB)'' and take necessary steps for billing. After submitting of the MB by me to the CRE office my job is complete and I am not aware of the procedure which is followed."

22. The detailed procedure in this regard has been explained by DW- 1. First, the measurements of the works are taken. Thereafter these measurements are recorded in the MB and then a bill is prepared and submitted to the Accounts Officer (''AO).'' The AO then types the bill proforma and makes pass orders. The pass order is to be submitted by the AO to the CRE. After the pass order is cleared by the CRE, a cheque is prepared by the AO. DW-1 stated that "there is no role of the CRE during the billing process till the time pass order is not made." Significantly, he also stated that "during my tenure on or before 2nd September 1999 I did not process any bill amounting to Rs. 37,000 or 22,000 in respect of work of Netaji Subhash Institute of Technology." Mr. S.R. Gupta (DW-4),had also explained the above procedure in detail.

23. On 6th September 1999 DW-4 wrote a letter (Ex.DW-4/A) to the Chairman-cum-Managing Director, RSBCC pointing out that there was only one bill of Rs. 37,000 relating to PW-5 in terms of MB No. 60 which was pending as on that date. A certified copy of the pages of MB 60 was seized by the CBI under seizure memo (Ex.PW-3/C) on 2nd September 1999. The other MB No. 746 was seized only on 6th September 1999 under seizure memo (Ex.PW-3/D). Both the MBs were produced by DW-4. Although it has come in the evidence of PW-7 (IO) that he recorded the statement of DW-4 during the investigation, the prosecution failed to produce DW-4 as a witness. Clearly, DW-4 supports the case of the defence in the present case. PW-7 stated that he did record the statement of DW-4 but admitted in his cross-examination that he did not place it on record before the Court.

24. The letter dated 6th September 1999 written by DW-4 was also not collected by the prosecution. The failure to do so was also not explained by the prosecution satisfactorily. That letter indicates that indeed the outstanding amount in relation to MB-60 was perhaps around Rs. 37,000 but it was certainly not on 11th July 1999 but was pending on the date of that letter, i.e., 6th September 1999.

25. A perusal of both the bills dated 11th July 1999 showed that they were in fact received by the officials of RSBCC only on 13th October 1999. The bill for a sum of Rs. 21,897 was received by DW-4 on 13th October 1999. The bill for Rs. 37,048 was also received by DW-4 on 13th October 1999. DW-4 negatived the suggestion that the bill was received from the office of CRE on 13th October

1999. The Respondent was under suspension as on that date. DW-4 also denied the suggestion that the said bill had not been received by him from PW-5 but from the Respondent.

26. A perusal of MB-746 shows as on 18th July 1999, the amount of Rs. 19,418 was payable for the works till then and after deducting Rs. 1942, the sum payable was found to Rs. 17,476. This amount was verified on 8th September 1999. This balance is not reflected in either of the bills purportedly raised by PW-5 on 11th July 1999. Neither bills appear to have been passed on any calculation contained in either MB-60 or MB-746. There was no question of bills directly being submitted to the Respondent without following the detailed procedure explained by DWs 1 and 4. Clearly, therefore, the prosecution has not been able to establish the case against the Respondent.

27. In similar circumstances in Delhi Administration Vs. Satish Chand Sharma, Division Bench of this Court emphasized that shifting of the burden on the prosecution what happened only after the prosecution discharged its duties of proving the basic facts on which the prosecution resisted. It has also emphasized that "unless that is done this legal presumption cannot be invoked."

28. Mr. Sanjeev Bhandari, learned Standing counsel appearing for the CBI repeatedly urged that it was highly improbable that the Respondent would be receiving a sum of Rs. 2,500 payable by PW-5 for the clearance of the bills of sub-contractor. However, this statement overlooks the evidence that has come during the depositions of PW-5 and PW-1, which makes it clear that there was agreement made about the damage, which required to be repaired and which was got done through the sub-contractor, who was to be paid Rs. 2,500.

29. It must be remembered that the defence witnesses has also put service and there was no need for them to depose falsely only to help the Respondent.

Conclusion

30. The Court is satisfied that no error has been committed by the learned trial Court in the above circumstances and on analysing the evidence it rightly granted the benefit of doubt to the Respondent.

31. The appeal is dismissed.

32. In terms of Section 437(A) Cr PC, the Respondent is directed to appear before the Registrar- General of this Court on 21st August 2014 and furnish his personal bond in the sum of Rs. 10,000 with one surety of the like amount to the satisfaction of the Registrar General for a period of six months for his appearance before the Supreme Court in the event the CBI wishes to file the SLP challenging the present order.