
(2012) 07 RAJ CK 0021

In the Rajasthan High Court

Case No : Special Appeal (Writ) No. 394 of 2010

State of Rajasthan

APPELLANT

Vs

Munish Kumar Sharma and Others

RESPONDENT

Date of Decision : 05-07-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 197, 200
Prevention of Corruption Act, 1988 — Section 13(1)(d)(2), 19, 7

Citation : (2012) CriLJ 4623 : (2013) 4 RLW 3704

Hon'ble Judges : Arun Mishra, C.J.;Narendra Kumar Jain, J

Bench : Division Bench

Advocate : R.P. Singh, AAG assisted by Shashi Kant Saini, for the Appellant;
Sunil Samdaria and Mohd. Rahil Kalam, for the Respondent

Final Decision : Dismissed

Judgement

1. Heard finally with the consent of learned counsel for the parties. The intra-court appeal is directed as against the order dated 10-3-2010 questioning legality of the order passed by single Bench in CWP-7156/2007, thereby quashing the grant of sanction of prosecution passed by the Director, Mines & Geological Department on 20-8-2007 in order to prosecute respondent No. 1 Munish Kumar Sharma for committing offence under Sections 7 and 13(1)(d)(2) of the Prevention of Corruption Act, 1998 (hereinafter referred to as "the Act") arising out of FIR No. 122/ 2005. Facts in short are that respondent No. 4 Amin Khan made a complaint to the Anti-Corruption Bureau on 1-6-2005 that an appeal was pending before Mr. G.L. Vyas, Additional Director, Mines and Geology, Bharatpur (hereinafter referred to as "ADM") who on meeting him in Circuit House on 30-5-2005 promised to decide the appeal in his favour and asked him to contact Munish Kumar Sharma. It was the case of the complainant that Mr. G.L. Vyas, ADM told him to decide the appeal in his favour and to meet Munish Kumar Sharma who was working in the office at Bharatpur. On the instruction of Mr. G.L. Vyas, ADM, the complainant met Munish Kumar Sharma and after due deliberations with Mr. G.L. Vyas, ADM, Munish Kumar Sharma informed the

complainant to make the payment of Rs. 15,000/-. A sum of Rs. 5,000/- was paid by the complainant to Mr. Munish Kumar Sharma with promise to pay the remaining amount of Rs. 10,000/- on 1-6-2005. This fact was brought to the notice of Anti-Corruption Bureau by the complainant. Trap was arranged and Munish Kumar Sharma was caught red-handed while accepting illegal gratification of Rs. 10,000/- on 1-6-2005. The conversation with Munish Kumar Sharma was also tape recorded.

2. The question of sanction was dealt with by Mr. G.L. Vyas, the then ADM himself in the capacity as Director though, illegal gratification was demanded by him and was to be paid to Munish Kumar Sharma on his behalf. Mr. Vyas, ADM ought to have recused himself from the case, but surprisingly, he took up the matter and declined to accord sanction to prosecute Munish Kumar Sharma vide order dated 28-8-2006, that too in utter violation of the direction laid down by the State Government in circular to the effect that in case competent authority is inclined to refuse the sanction of prosecution such cases have to be referred to Administrative Department and competent authority will only mention tentative view that the case is not the one where sanction of prosecution should be granted as provided in Circular dated 6-4-2002 issued by the Government of Rajasthan, Department of Personnel (A-3).

3. In Circular dated 6-4-2002, it has been mentioned that if the competent authority, after examining all the relevant evidence, is prima facie of the view that sanction of prosecution cannot be accorded, he shall make a reference to the concerned Administrative Department; he should not record a final decision on the file before referring the matter to the concerned Administrative Department and he will only form tentative opinion before hand that the case is not one where sanction of prosecution should be granted. The Secretary of the concerned Administrative Department will examine all the evidence available on the record and also discuss the case with the concerned competent authority. If the Secretary of the concerned Administrative Department is then of the view that there is adequate evidence available on the record to form an opinion that a prima facie case is made out against the concerned government servant, the case will be referred back to the concerned competent authority for re-examination of the matter and taking a decision accordingly. It was also mentioned that it would not be proper for the immediate higher authority to grant the sanction of prosecution where the competent authority is of the view that it is not a case where sanction of prosecution should be accorded.

4. It is not in dispute that the matter was not referred to the Administrative Department. Mr. Vyas, ADM on whose behalf the illegal gratification was received by Munish Kumar Sharma to decide the appeal, in the fact, he could not have held that there was no likelihood of succeeding in the case by prosecution. Mr. Vyas was himself involved in the case, as such propriety required that he should have recused from the case. Thereafter, application was filed under the Right to Information Act by Chief Editor, Samta Sandesh Bhupalpura, Udaipur praying for

receipt of the documents regarding sanction alongwith note-sheets in this matter, which came to the notice of the Administrative Department. The file of note-sheets of Department of Mines & Geology has been produced by the State Government same indicate that Administrative Department opined that it was a case where sanction should have been granted, as such, the matter is required to be reconsidered. It is apparent from the note-sheet dated 9-11-2006 that copy of the letter was sent to the Additional Director, Mines & Geology. Letter of the Secretary, Mines & Geology, Jaipur alongwith original file of the investigation in the case of Munish Kumar Sharma was also received by the department on 12-12-2006. As apparent from the note-sheet dated 19-12-2006 of the Directorate, it was clear case of receiving illegal gratification, as such, the matter should be reconsidered. It was mentioned in the note-sheet dated 15-3-2007 that the matter should be re-considered in light of the Circular dated 6-4-2002 and the earlier order should be reviewed. Thereafter, reminder was written and ultimately after reconsideration of the matter as apparent from the various note-sheets, it was decided finally by the Director, Mines & Geology to accord the sanction of prosecution.

5. The order of granting sanction was passed on 20-8-2007, the same was impugned before the single Bench by way of filing the writ petition by respondent No. 1. The single Bench by the impugned order has quashed the sanction of prosecution on the ground that there was no additional or new material brought on record so as to review the earlier order of refusal of sanction dated 28-8-2006. The single Bench has observed that there should be an independent application of mind to the facts of the case as also the material and evidence collected during the investigation; scope of administrative review is limited. In the instant case, neither addition nor new material was available with the sanctioning authority and review was made only on the basis of Circular dated 19-4-2007, it was not applicable in the matter of review of the earlier order. It has also been observed that statement of complainant recorded u/s 200, Cr.P.C. before the A.C.J.M. No. 2, Bharatpur in the case was not taken into consideration while according the sanction; otherwise also, it is unbelievable that complainant Amin Khan would have offered an amount of Rs. 10,000/- on 1-6-2005 in respect of appeal which has already been decided on 30-5-2005; the earlier order dated 28-8-2006 has not been considered while passing the fresh order. Thus, it was passed without due application of mind. Aggrieved thereby, the State Government has preferred the intra-court appeal.

6. Mr. R.P. Singh, Senior Counsel and Additional Advocate General appearing with Mr. Shashi Kant Saini on behalf of appellant has submitted that in the instant case, it was not open to Director Mr. Vyas, the then ADM to pass the order of refusal to grant sanction as his name was mentioned at several places in the FIR as the person who had demanded illegal gratification. Mr. Vyas, ADM, who subsequently became Director, Mines & Geology, ought to have recused himself from dealing with the matter of grant of sanction. His position was that of accomplice in the case. He was interested in refusing the sanction as he himself

was involved in the criminal case. Apart from that, he ought to have referred the matter to the Administrative Department for the opinion as envisaged in the Circular dated 6-4-2002. When the facts came to notice of the Administrative Department, review was opined as there was sufficient material on record to direct prosecution. It was a case where the respondent Munish Kumar was caught red handed while accepting illegal gratification on behalf of Shri Vyas. Defence could not have been taken into consideration at the stage of sanction. Questioning the sanction by considering facts of date of receipt of application as done by the single Bench was not permissible, there was overwhelming evidence on record, which was taken into consideration while granting sanction. When review has been made in peculiar facts of the case as earlier order was non-est in the eye of law, it was not necessary to collect new material. In the facts of the instant case, the decisions which have been relied upon are not applicable as such the impugned order is liable to be set aside. He has produced the original file of the Directorate dealing with the sanction and various communications which were received from the Administrative Department with respect to review of the order declining sanction of prosecution, which had been passed earlier by Mr. Vyas, vide order dated 28-8-2006.

7. Mr. Sunil Samdaria, learned counsel appearing on behalf of respondents has supported the order passed by single Bench. He has submitted that once sanction had been declined earlier by the sanctioning authority i.e. Mr. G.L. Vyas, ADM vide order dated 28-8-2006, it was not open to accord sanction afresh by the Director, Mines & Geology, vide order dated 28-8-2007. No reference in it was made to the earlier order of refusing to grant sanction. He has further submitted that neither any fresh material was brought on record nor any further investigation was made in the case. Consequently, earlier order could not be reviewed. In case, there was some illegality in the order dated 28-8-2006, it could have been challenged in appropriate proceedings by investigating agency which was not done.

8. Learned counsel for the respondents has further submitted that the question was not urged before the single Bench that Mr. G.L. Vyas was not competent to deal with the matter. Thus, this question cannot be raised and considered by the Court in the intra-court appeal though, his name might have been mentioned in the FIR as the person who had demanded illegal gratification from the complainant. He has also referred various decisions which have been relied by the single Bench and has also relied upon the decision of the Apex Court in V. Venkata Subbarao Vs. State, represented by Inspector of Police, A.P., He has also attracted our attention to the Wednesbury principle of reasonableness. He has submitted that order of grant of sanction was unreasonable and illegal and has been rightly quashed by the single Bench. He has also submitted that after quashing the sanction by the single Bench, the accused has been discharged on that basis by criminal Court. Thus, it is not a fit case where interference is called for in the order passed by the single Bench.

9. First question for consideration is whether the order dated 28-8-2006 passed by Mr. G.L. Vyas was legal and valid in the eye of law. The FIR on record admittedly reflects his name as the person who demanded illegal gratification from the complainant-Amin Khan and it was mentioned in the documents submitted by the prosecution that by that time enough material could not be collected against Mr. G.L. Vyas, who at the time of commission of offence was holding post of Additional Director, Mines & Geology. Thus, it was a case where Mr. Vyas could not have considered the matter and given clean chit to Munish Kumar Sharma who collected illegal gratification which was in fact demanded by Mr. Vyas, collected by Munish Kumar Sharma on his behalf. Complainant's case was that Shri G.L. Vyas himself demanded illegal gratification and asked him to contact Munish Kumar Sharma who obtained instructions from Mr. Vyas and received illegal gratification in two instalments. While receiving second instalment of Rs. 10,000/-, he was caught red handed. It is trite law that a person cannot become Judge in his own case *Nemo index in causa sua*. Thus, in our considered opinion, the order of refusal to grant sanction dated 28-6-2006 was illegal and void. Mr. G.L. Vyas could not have dealt with the matter of sanction in the case at hand in which he himself was involved. The order was illegal and non-est. Thus, review of the order was necessitated. Apart from that, facts make out that Mr. G.L. Vyas was bent upon to help the respondent Munish Kumar Sharma. Mr. G. L. Vyas has not only violated the instructions contained in Circular dated 6-4-2002 laying down that in case sanctioning authority is of the opinion to decline sanction of prosecution in such matters of the Prevention of Corruption Act, 1988, he should not record a final decision on the file and has to refer the matter to the concerned Administrative Department and he will only mention that he is tentatively of the view that the case is not one where sanction of prosecution should be granted and then Secretary has to examine the case by considering evidence and only thereafter, final order is required to be passed by the Sanctioning Authority. This internal safeguard provided in Circular dated 6-4-2002 was not followed by Mr. Vyas. Thus, in our considered opinion, this was a clear case where review of the order was called for.

10. It was not necessary in the facts and circumstances of the case to investigate the matter further when the person who has dealt with the sanction and passed order of refusal was himself involved in the criminal case and the very genesis of the case was based on the illegal gratification demanded by same person Mr. G.L. Vyas. The order of declining sanction dated 28-8-2006 could not have been passed by Shri G.L. Vyas as matter of sanction was required to be considered by an independent person. Therefore, review of the order was rightly suggested by the higher Administrative Authorities. In the light of various correspondence on record, matter was later on considered by independent person, who has passed well considered order duly considering each and every aspect of the case, evidence on record collected by the prosecution and considering the overwhelming evidence. It was rightly concluded that in the case sanction to prosecute was required to be accorded.

11. The single Bench has looked into the statement of the complainant recorded during the course of private complaint which could not have been taken into consideration at this stage. The consideration was required of the prosecution case and the evidence collected by the prosecution. The single Bench has also not taken upon itself to go into the credibility of the case set upon the ground that when the appeal was decided on 30-5-2005 what was the necessity to make payment of Rs. 10,000/- on 1-6-2005. This question could not have been gone into as the demand of illegal gratification was made at earlier point of time and it is not finding that the complainant was aware of the decision rendered on 30-5-2005 when Mr. G.L. Vyas was holding the post of ADM and has demanded illegal gratification, same was paid in two parts; initially a sum of Rs. 5,000/- was paid before decision and remaining Rs. 10,000/- was promised to be paid on 1-6-2005. There is overwhelming evidence of trap and receipt of Rs. 10,000/- as illegal gratification. Shri Munish Sharma was caught red handed, all the evidence in this regard could not have been discarded at the stage of sanction. The scope of judicial review is limited in such matters. It is a case where sanction order mentioned in detail overwhelming evidence on record on the basis of which the sanction was granted. It was not open to go into the merits of the case at this stage appreciating the evidence and to give a clean chit to the respondent as done by the single Bench.

12. Mr. Sunil Samdaria, learned counsel appearing on behalf of respondents has placed reliance on decision of the Apex Court in V. Venkata Subbarao Vs. State, represented by Inspector of Police, A.P., laying down that Sanctioning Authority should consider the entire material on the record and in that view of the matter the order of sanction was held to be vitiated when the entire material was not taken into consideration. The ratio of the decision is not attracted in the instant case. In the instant case, the sanctioning authority has taken into consideration the entire material on record and the file reflects that necessity to review the order dated 28-8-2006 arose in the aforesaid peculiar circumstances. Thus, there was justification to review the order dated 28-6-2006 passed by Mr. G.L. Vyas and afresh order was rightly passed on 20-8-2006. The order dated 28-8-2006 was illegal and void. Mr. G.L. Vyas could not have dealt with the file himself in the facts and circumstances of the case. Thus, reasonings of the order dated 28-8-2006 which employed by Mr. G.L. Vyas were not required to be taken into consideration as the order was completely vitiated and passed in illegal manner by person involved in criminal case.

13. Mr. Sunil Samdaria, learned counsel appearing on behalf of respondents has also relied upon decision in State of Himachal Pradesh Vs. Nishant Sareen, laying down that though, the Government in the matter of grant of sanction exercises statutory power and that would not mean that power once exercised cannot be exercised again or at a subsequent stage in the absence of express power of review in no circumstance whatsoever. The Apex Court has clearly laid down that it is open to review the orders, however, the power of review is not unbridled or unrestricted. It is not open for the Sanctioning Authority to review or to

reconsider the matter on the same material again otherwise the matter concerning sanction may be reopened by such authority for the reasons best known to it and a different order may be passed. It is not open to change the opinion, in case, change of opinion is permitted, there may not be any end to such statutory exercise. The Apex Court has laid down in *Nishant Sareen* (supra) thus :

12. It is true that the Government in the matter grant of refusal to grant sanction exercises statutory power and that power once exercised cannot be exercised again or at a subsequent stage in the absence of express power of review in no circumstance whatsoever. The power of review, however, is not unbridled or unrestricted. It seems to us a sound principle to follow that once the statutory power u/s 19 of the 1988 Act or Section 197 of the Code has been exercised by the Government or the competent authority, as the case may be, it is not permissible for the sanctioning authority to review or reconsider the matter on the same materials again. It is so because unrestricted power of review may not bring finality to such exercise and on change of the Government or change of the person authorized to exercise power of sanction, the matter concerning sanction may be reopened by such authority for the reasons best known to it and a different order may be passed. The opinion on the same materials, thus, may keep on changing and there may be any end to such statutory exercise.

13. In our opinion, a change of opinion per se on the same materials cannot be a ground for reviewing or reconsidering the earlier order refusing to grant sanction. However, in a case where fresh material have been collected by the investigating agency subsequent to the earlier order and placed before the sanctioning authority and on that basis, the matter is reconsidered by the sanctioning authority and in light of the fresh materials an opinion is formed that sanction to prosecute the public servant may be granted, there may not be any impediment to adopt such a course.

14. Insofar as the present case is concerned, it is not even the case of the appellant that fresh material were collected by the investigating agency and placed before the sanctioning authority for reconsideration and/or for review of the earlier order refusing to grant sanction. As a matter of fact, from the perusal of the subsequent Order dated 15-3-2008 it is clear that on the same materials, the sanctioning authority has changed its opinion and ordered sanction to prosecute the respondent which, in our opinion, is clearly impermissible.

15. By way of footnote, we may observe that the investigating agency might have had legitimate grievance about the Order dated 27-11-2007 refusing to grant sanction, and if that were so and no fresh materials were necessary, it ought to have challenged the order of the sanctioning authority being not of continuing character could have been exercised only once on the same materials.

14. It is apparent from the aforesaid decision in *Nishant Sareen* that is open to review an order of sanction, however, it has been laid down that in absence of

fresh material, review cannot be made. In the instant case, sanctioning authority involved in the case has admittedly dealt with the matter himself. While refusing sanction, he ought to have recused himself to even consider file regarding grant of sanction as illegal gratification was demanded by him and he was involved in the criminal case as mentioned in the FIR and he could not have been given even clean chit to Munish Sharma as he obtained illegal gratification on his behalf. Thus, overwhelming evidence being on record, it was a peculiar case in which earlier order for sanction was rightly reviewed on 20-8-2007. It was not necessary to collect fresh material.

15. Learned counsel has submitted on the basis of decision of Nishant Sareen (*supra*) that it was necessary to challenge the order of sanctioning authority by the investigating agency in appropriate proceedings as the review was impermissible in absence of fresh material as laid down in the aforesaid decision by the Supreme Court. In our opinion, in the facts of the case, review has been legally and validly made, it was not necessary to question it in any other proceedings nor it was necessary to collect fresh material.

16. The single Bench has relied upon the decision rendered by the Apex Court in *Gopikant Choudhary v. State of Bihar*, (2000) 9 SCC 53 in which it has been laid down that fresh materials are required to be collected for reviewing the earlier order of sanction. The single Bench has also relied upon the decision in *Kishan Lal Vs. State of Rajasthan and Others*, in which it has been laid down that sanctioning authority has not to execute command of an administrative officer but was required to apply his mind objectively before granting sanction of prosecution. In the instant case, mind has been applied while granting the sanction. Director, Mines & Geology has not acted upon the finding recorded and issued by the Secretary and Deputy Secretary of the Administrative Department. In the instant case, independent mind has been applied and the impugned order dated 20-8-2007 was passed granting sanction. The single Bench has also relied upon the decision in *State of Rajasthan Vs. Keshar Dev and Another*, in which decision of the Apex Court in *Mansukhlal Vithaldas Chauhan Vs. State of Gujarat*, was taken into consideration and it has been observed that validity of sanction depends on applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation. Independent mind has to be applied by the sanctioning authority. The discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. It has been laid down that sanction should be accorded by applying mind by independent person.

17. In the instant case, the aforesaid requirement was not fulfilled on earlier occasion when sanction was refused by Mr. G.L. Vyas, who was not on position to apply independent mind as he himself was involved in the criminal case and there was serious allegation against him, whereas the subsequent order was rightly passed on 20-8-2007 by Director, Mines & Geology granting sanction,

same fulfills the requirement of due application of mind by independent person. Thus, the ratio of the decisions relied upon by the respondents referred by the single Bench are not applicable in the instant case.

18. It has also been submitted by Shri Samdaria learned counsel appearing on behalf of the respondent that Mr. G.L. Vyas himself was involved in the criminal case, was not submitted before the single Bench, as such, it cannot be raised in the intra-court appeal. Though, he has rightly not disputed that Mr. G.L. Vyas, who refused grant of sanction, was named in the FIR at several places as the person who demanded illegal gratification from Amin Khan and asked him to pay it to Munish Kumar Sharma. Thus, when the aforesaid fact is on record of the criminal case and is not disputed, it is not a new case set up, this aspect ought to have been taken into consideration by the single Bench as it was mentioned in FIR itself. Thus, we reject the submission raised by Shri Samdaria that the question of involvement of Shri G.L. Vyas cannot be considered by this Court in intra-court appeal. It is open to consider the question, even if it was not raised when the documents are there on record and mention of name of Shri Vyas in FIR is admitted.

19. Coming to the submission raised by Mr. Sunil Samdaria, learned counsel appearing on behalf of respondent based upon principles of *Wednesbury* unreasonableness, considered by the Apex Court in *Tata Cellular Vs. Union of India*, which is quoted below :

78. What is this charming principle of *Wednesbury* unreasonableness? Is it a magical formula? In *R. v. Askew* (1768) 4 Burr 2186) Lord Mansfield considered the question whether mandamus should be granted against the College of Physicians. He expressed the relevant principles in two eloquent sentences. They gained greater value two centuries later:

It is true, that the judgment and discretion of determining upon this skill, ability, learning and sufficiency to exercise and practice this profession is trusted to the College of Physicians and this Court will not take it from them, nor interrupt them in the due and proper exercise of it. But their conduct in the exercise of this trust thus committed to them ought to be fair, candid and unprejudiced; not arbitrary, capricious, or biased; much less, warped by resentment, or personal dislike.

20. It cannot be said that while granting sanction principle of *Wednesbury* has not been followed, rather, it has been observed and followed in the instant case. In our opinion, the order passed by the single Bench cannot be sustained. Criminal case has to proceed in accordance with law. Resultantly, the intra-court appeal is allowed. Impugned order is quashed and set aside. The writ petition is dismissed. Civil Misc. Stay Application No. 2697/2010 is also disposed of. No order as to costs.