

C. K. Damodaran Nair

Vs

Govt. of India

Criminal Appeal No. 687 of 1989

(M. K. Mukherjee, S. P. Kurdukar JJJ)

08.01.1997

JUDGMENT

M. K. MUKHERJEE, J. -

1. Four Provident Fund Inspectors of Calicut including the appellant before us were tried by the Special Judge, Ernakulam for offences punishable under Section 161 IPC and Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act, 1947 (Act" for short). The learned Judge acquitted all of them and aggrieved thereby the respondent preferred an appeal. The High Court disposed of the appeal by setting aside the acquittal of the appellant and convicting him for the above offences while maintaining the acquittal of the other three. Hence this appeal at the instance of the appellant.

2. According to the prosecution case on 24-3-1984 the appellant and two of the other three accused persons (who were arrayed as A-3, A-1 and A-2 respectively at the trial and will hereinafter be so referred to) visited the Relief Hospital at Kondotty, of which Dr. Moideenkutty (PW 1), K. K. Nair (PW 2) and Haneefa (PW 9) were the Managing Partner, Office Manager and Assistant Manager respectively. There they first met PW 2 and then, along with him, went to meet PW 1. Before PW 1 they disclosed their identities and told that they had come to inspect the records of the Hospital. Accordingly, under directions of PW 1, PW 2 handed over the attendance book and wage registers to them. The three accused persons then directed PW 2 to produce all other relevant records of the Hospital including the partnership deed in their office on 29-3-1984. As directed, PW 9 took the records to the office of the above three accused persons on the appointed day. Even though, A-1 and A-3 scrutinised the records on that day they asked PW 9 to produce the same again on the following day i.e. 30-3-1984. On the day so fixed when PW 9 and PW 2, along with the records, went to the office of the accused persons they found only A-2 present there. A-2 directed PWs 2 and 9 to go and meet A-1 and A-3 who were waiting for them in Room No. 17 of the nearby Alakapuri Guest House. PW 2 and PW 9, then went to Alakapuri Guest House and met A-1 and A-3. A-3 told PWs 2 and 9 that the Hospital would have to pay Rs. 7500 towards its provident fund contribution but if they were paid Rs. 3500 the Hospital could be exempted from such payment. When PW 9 expressed his inability to pay the amount demanded, A-1 insisted on payment of at least Rs. 2000 and out of that amount Rs. 1000 on 31-3-1984 in their office. PWs 2 and 9 then returned to the Hospital and apprised PW 1 about the talks they had with the three accused persons. For making such illegal demand PW 1 decided to complain against the accused persons to the CBI and handed over a sum of Rs. 1000 to PW 9 for payment to them at the appropriate time. On 31-3-1984 PW 9 visited the office of the accused when A-2 alone was present and he asked PW 9 whether he had brought the amount. PW 9 however told A-2 that he could not bring the amount as he could not contact PW 1. A-2 thereupon instructed PW 9 to bring the money to their office on 2-4-1984 before 10.30 a.m.

3. Immediately thereafter PW 9 contacted Inspector Thomas John (PW 10) of the CBI Office, Cochin over phone from Calicut. On being told about (the entire episode PW 10 reached Calicut the same evening accompanied by ASI A. D. Nambiar and Constable Sreekumar and met PW 9. PW 9 gave a written complaint (Ext. P-16) to PW 10 and the latter immediately forwarded the same to the Superintendent of Police, (SP) CBI, Cochin through a constable. The SP CBI marked the complaint to Inspector S. Vijaykumar (PW 8) with a direction to register a case under Section 161 IPC and arrange a trap. In terms of the said direction PW 8 drew up an FIR (Ext. P-15) and immediately proceeded to Calicut along with Inspector M. R. Kurup and two constables to lay a trap. On arrival at Calicut PW 8 ensured the presence of two local witnesses viz. Premarajan (PW 3), local Manager of the State Bank of India and K. V. Anandakrishnan (PW 4), an Accountant of Canara Bank. PW 10 then directed PW 9 to meet the police party in Room No. 204 of the Neelima Lodge on 2-4-1984 at 7.30 a.m. where PW 8 had directed PWs 3 and 4 to be present.

4. On 2-4-1984 PWs 3, 4 and 9 and the trap party consisting of PWs 8 and 10 and Inspector M. R. Kurup, ASI A. D. Nambiar and the constables assembled at Neelima Lodge around 7.30 a.m. PW 10 introduced the persons present there and read out the complaint (Ext. P-16) in their presence. After PW 9 had vouched for its genuineness PW 10 took 10 hundred rupee notes from PW 9 which were to be given to the accused as bribe and got their numbers noted by PWs 3 and 4. Thereafter Sodium-phenolphthalein test was demonstrated to the witnesses and the resultant solution was preserved in a bottle which was sealed and attested by the witnesses. The notes were then smeared with phenolphthalein powder and entrusted to PW 9 with instructions to hand over the same to the accused preferably outside the office on their asking for the bribe. A sign (wiping of the face with a handkerchief), which PW 9 was to display if the accused received the bribe was also prearranged. An entrustment mahazar was then prepared by PW 10 detailing the above procedure and the numbers of the notes. Thereafter PW 3 and PW 4 were instructed to follow PW 9 and witness the transaction between PW 9 and the accused.

5. The party thereafter proceeded to the office of the accused at or about 10 a.m. PW 9 first went inside the office and met A-3. Following him PW 3 also went inside the office introducing himself as a telephone employee. A-3 asked PW 9 whether he had brought the money. Thereupon PW 9 gave a proposal that they would go to a nearby hotel to which A-3 agreed. A-3 also called A-2 and the other accused (A-4) who were present there. The party consisting of the above four persons then went to Hotel Nilgiris followed by PW 3. The rest of the trap party who were waiting outside the office also followed PW 9. They went inside the family room of the hotel and took tea. PW 3 and other members of the party took positions in the nearby dining hall from where they could see the inside of the family room. After taking tea A-3 asked PW 9 to hand over the amount. PW 9 then handed over the notes to A-3 who kept them in the right pocket of his trousers after counting. They then came out of the family room followed by PW 9 and by the time they reached the counter they were apprehended by the CBI Officials. A-3 immediately started weeping and admitted to have received the bribe. The palms of A-3 and the right pocket of his trousers were then subjected to phenolphthalein test which gave positive results. Thereafter A-3 took out the notes from the pocket of his trousers and the numbers of the notes were compared by PWs 3 and 4 with the numbers noted in the entrustment mahazar and they were found to tally. Thereafter the accused were taken to their office where the table used by A-1 and A-3 was searched and a draft enquiry report prepared by A-3 in respect of the Hospital was recovered and seized. From personal search of A-2 a diary was also recovered. The investigation was subsequently taken over by Inspector V. A. Mohan (PW 11) and on completion thereof he filed charge-sheet against the four accused.

6. All the four accused pleaded not guilty to the charges levelled against them. When examined

under Section 313 CrPC the appellant (A-3) admitted that he along with A-1 had visited the Hospital on 24-3-1984, that they had verified the registers (Exts. P-1 and P-2) and that they had handed over a list of documents to the Hospital authorities with a direction to produce them on 27-3-1984 in their office for inspection. He however denied to have met PWs 1 or 9 on any day after 24-3-1984; and stated that on 2-4-1984 PW 9 did not come to their office. According to the appellant, he and A-2 were on outdoor duty on that day and while they were taking tea in the family room of Nilgiris Hotel, PW 9 approached him and forcibly put some notes in his trousers' pocket. He immediately brought them out and insisted upon PW 9 to take them back but in the meantime the CBI Officers came and arrested him.

7. On consideration of the evidence of the eleven witnesses examined on behalf of the prosecution (no witness was examined on behalf of the defence) and the other materials on record the trial court observed that the prosecution succeeded in proving recovery of the ten hundred rupees notes, which were entrusted to PW 9 for handing over to the appellant, from him; but as, according to it, the prosecution failed to prove beyond reasonable doubt that the appellant demanded and accepted the said amount and the defence of the appellant that he was taken to the family room of Hotel Nilgiris where PW 9 thrust the notes into his trousers' pocket was a probable one, acquitted him. In setting aside his acquittal the High Court firstly held that the finding of the trial court that the appellant neither demanded nor accepted the amount of Rs. 1000 was perverse. Besides, the High Court held, relying upon the judgment of this Court in *Hazari Lal v. State (Delhi Admn.)* ((1980) 2 SCC 390 : 1980 SCC (Cri) 458 : AIR 1980 SC 873) that the recovery of the above notes from the appellant coupled with the other attending circumstances on record entitled the court to draw a presumption under Section 4(1) of the Act and since the appellant failed to rebut that presumption, he was liable for conviction for accepting illegal gratification.

8. Mr. Nambiar, the learned counsel for the appellant, contended that the judgment of the trial court acquitting the appellant was based on a proper appreciation of the evidence and hence the High Court was not at all justified in setting aside the same. Mr. Nambiar next contended that one of the essential ingredients of the offences for which the appellant was convicted is a demand for illegal gratification and as the trial court recorded, after proper appraisal of the evidence, a categorical finding that the prosecution signally failed to prove such demand, the recovery of the notes from the appellant by itself could not have been made a ground for drawing the statutory presumption under Section 4(1) of the Act.

9. Before we proceed to consider whether the prosecution has, in fact, succeeded in proving that the appellant demanded bribe from the Hospital authorities it will be necessary to ascertain whether such demand is an essential ingredient of the offences in question. To sustain the charge under Section 161 IPC since omitted from the IPC and incorporated in Section 7 of the Prevention of Corruption Act, 1988 ("1988 Act" for short) with certain modifications against the appellant the prosecution was required to prove that :

(i) the appellant was a public servant at the material time;

(ii) the appellant accepted or obtained from PW 9 a gratification other than legal remuneration; and

(iii) the gratification was for exempting the Hospital in question from its liability to pay statutory provident fund contributions.

10. So far as the other offence is concerned, Section 5(1)(d) of the Act [now replaced by Section 13(1)(d) of the 1988 Act] lays down that if a public servant, by corrupt or illegal means or by otherwise abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage he would be guilty of "criminal misconduct" and Section 9(2) thereof [which corresponds to Section 13(2) of the 1988 Act] speaks of the punishment for such misconduct. The other section which requires reproduction is Section 4(1) of the Act [it corresponds to Section 20(1) of the 1988 Act]. It reads as under :

"Where, in any trial of an offence punishable under Section 7 or Section 11 or clause (a) or clause (b) of sub-section (1) of Section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in Section 7 or, as the case may be, without consideration or for consideration which he knows to be inadequate."

11. From a combined reading of Section 161 IPC and Section 4(1) of the Act it is evident that if, in the instant case, the prosecution has succeeded in proving that the appellant was a public servant at the material time and that he had "accepted" or "obtained" Rs. 1000 from PW 9 as gratification not only the first two ingredients of the former would stand proved but also the third, in view of the presumption under the latter which the court is bound to draw unless, of course, the appellant, in his turn, has succeeded in rebutting that presumption. According to Shorter Oxford Dictionary "accept" means to take or receive with a "consenting mind". Obviously such a "consent" can be established not only by leading evidence of prior agreement but also from the circumstances surrounding the transaction itself without proof of such prior agreement. If an acquaintance of a public servant in expectation and with the hope that in future, if need be, he would be able to get some official favour from him, voluntarily offers any gratification and if the public servant willingly takes or receives such gratification it would certainly amount to "acceptance" within the meaning of Section 161 IPC. It cannot be said, therefore, as an abstract proposition of law, that without a prior demand there cannot be "acceptance".

12. The position will, however, be different so far as an offence under Section 5(1)(d) read with Section 5(2) of the Act is concerned. For such an offence prosecution has to prove that the accused "obtained" the valuable thing or pecuniary advantage by corrupt or illegal means or by otherwise abusing his position as a public servant and that too without the aid of the statutory presumption under Section 4(1) of the Act as it is available only in respect of offences under Section 5(1)(a) and (b) - and not under Section 5(1)(c), (d) or (e) of the Act. "Obtain" means to secure or gain (something) as the result of request or effort (Shorter Oxford Dictionary). In case of obtainment the initiative vests in the person who receives and in that context a demand or request from him will be a primary requisite for an offence under Section 5(1)(d) of the Act unlike an offence under Section 161 IPC, which, as noticed above, can be, established by proof of either "acceptance" or "obtainment".

13. Keeping in view the above principles we may now consider the facts of the instant case to ascertain whether the High Court was justified in setting aside the order of acquittal recorded in favour of the appellant. As already noticed the appellant did not dispute the fact that the sum of Rs. 1000 was recovered from his possession. While according to the prosecution the appellant

"accepted" that amount, the appellant contended that the same was thrust into his trousers' pocket by PW 9. From the judgment of the trial court we find that the principal reason which weighed with it for accepting the case of the defence in preference to that of the prosecution was that PW 9 was an interested witness and PWs 3 and 4, the two independent witnesses, who were examined by the prosecution to prove the transaction did not speak about any demand made by the appellant. Having gone through the evidence of the above two witnesses, namely, PWs 3 and 4 we are in complete agreement with the High Court that the finding recorded by the trial court in this regard is patently perverse. Both these witnesses, who at the material time were holding responsible positions in State Bank of India and Canara Bank respectively, categorically stated that they saw PW 9 taking out the notes from his shirt's pocket and handing over the same to Damodaran (the appellant), and the appellant, after counting those notes, putting them in the right front pocket of his trousers. The unimpeachable evidence of these two independent witnesses conclusively proves that the transaction was consensual. That necessarily means that the appellant "accepted" the money and the defence story that PW 9 thrust the money is patently untrue. Consequent upon such proof, the presumption under Section 4(1) of the Act would operate and since the appellant did not rebut that presumption the conviction of the appellant under Section 161 IPC has got to be upheld.

14. That brings us to the question whether the conviction of the appellant for the other offence under Section 5(1)(d) read with Section 5(2) of the Act can be sustained or not. The prosecution led evidence through PWs 2 and 9 that the appellant and the other accused persons had earlier demanded bribe to exempt their Hospital from the operation of the Employees' Provident Funds Act. Since there is no reason to disbelieve their evidence and since their evidence gets amply corroborated by the fact of acceptance of Rs. 1000 by the appellant subsequently on 2-4-1984, as testified by a number of witnesses including PWs 3 and 4 it is manifest that the appellant obtained the money pursuant to the demand earlier made by him by abusing his position as a public servant. The conviction of the appellant under Section 5(2) of the Act is also therefore well merited.

15. On the conclusions as above we uphold the convictions recorded against the appellant. Since the sentence of rigorous imprisonment for six months and a fine of Rs. 2000 imposed upon the appellant for each of the above convictions errs on the side of leniency, no interference in respect thereof is called for. The appeal is, therefore, dismissed. The appellant, who is on bail, shall now surrender to his bail bonds to serve out the sentence.