SUPREME COURT OF INDIA

C.M. Girish Babu

Vs.

CBI, Cochin, High Court of Kerala

Crl.A.No.377 of 2009

(Lokeshwar Singh Panta and B. Sudershan Reddy JJ.)

24.02.2009

JUDGMENT

B.Sudershan Reddy, J.

1. Leave granted.

2. The appellant along with Accused No.1 was tried for offences under Section 120B of IPC read with Section 7 and 13 (2) read with 13(1) (d) of Prevention of Corruption Act, 1988 (hereinafter referred to as "the said Act") by Special Judge (SPE/CBI)-I, Ernakulam who by his judgment dated 30th March, 2002 convicted the appellant for the offence punishable under Section 7 read with Section 13(1) (d) and 13(2) of the said Act. He was acquitted of the charge under Section 120B of the IPC. The appellant was accordingly sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.20,000. In default for payment of fine the appellant was further ordered to undergo rigorous imprisonment for a further period of six months for the offence punishable under Section 13(1) read with Section 13(2) of the said Act. He was also sentenced to undergo rigorous imprisonment for two years for the offence punishable under Section 7 of the said Act. The substantive sentences were directed to run concurrently.

3. The appellant preferred an appeal to the Kerala High Court at Ernakulam, which dismissed the appeal by its judgment dated 28th November, 2007. However, the Appellate Court reduced the substantive sentence to that of one year only. The High Court acquitted the first accused of all the charges against which State preferred no appeal. This appeal is brought, by special leave against the judgment of the High Court.

4. The prosecution case is that while accused no.1 working as the Inspector of Central Excise, Air Cargo Complex, Trivandrum, demanded an amount of Rs.1,500/- as gratification from one Dayanandhan-PW10 and Prakash Kumar-PW2, who were the Senior Assistant and Manager respectively of M/s. Interfrieght Services Pvt. Ltd., Trivandrum as a motive or reward for giving clearance for a wet grinder booked by one P. S. Shine to be sent to Dubai.

5. The appellant was also working as Inspector of Central Excise, Air Cargo Complex, Trivandrum along with Accused no. 1. On 2nd October, 1999 at about 6 a.m. the appellant is stated to have actually demanded the amount of Rs.1,500/- from Dayanandhan-PW10 as gratification for clearing the same wet grinder and accepted the bribe amount for himself and on behalf of accused no.1 and thereby committed offences under Section 7 read with Section 13(1) (d) and 13(2) of the said Act.

6. The prosecution story as unfolded during the trial is that the appellant and Accused no. 1 together conspired and committed the act of demanding and accepting gratification.

7. In the present case, it may not be really necessary to discuss the entire evidence available on record for the simple reason that the High Court acquitted the Accused no. 1 of all the charges and found no case against him. It is the Accused no. 1 who is stated to have demanded the gratification for clearing and sending wet grinder to Dubai. The High Court as well as the trial court found that there was no criminal conspiracy between the appellant and accused no. 1 and therefore acquitted both of them of the charge under Section 120B of the IPC.

8. The High Court upon re-appreciation of evidence came to the conclusion that the prosecution miserably failed to prove the charge against the appellant for the offence under Section 13 (1) (d) read with Section 13 (2) of the said Act. In this regard, the High Court found that there is nothing in the evidence of PW-11 - Natarajan, official witness, to arrive at any conclusion of appellant making any demand of gratification. PW-11 stated that from the conversation between the appellant and PW-10, he could heard the appellant asking "is it ready?" and PW-10 only nodding his head. It is for that reason the High Court recorded that the alleged demand by the appellant on 2.10.1999 is highly doubtful and is not proved beyond reasonable doubt. The High Court relied upon yet another circumstance creating a doubt as regards the demand of any gratification by the appellant as there is no mention of any such demand in Exhibit P-9 - post trap mahazar. The High Court accordingly acquitted the appellant of charges under Section 13(1)(d) read with Section 13(2) of the said Act.

9. The prosecution story mainly rested upon the evidence of PW-10 who is the central figure in the entire story of the prosecution. He did not support the prosecution story and was declared hostile. It was to him that the Accused No.1 had allegedly made a demand of gratification on the morning of 1.10.99 and it was in his presence Accused No.1 repeated the demand when he went along with PW-2 in the evening of 1.10.99 to the Air Cargo office. This is the version given by PW-2. But PW-10 does not support this story. PW-10 in his evidence stated that on 1.10.99 Accused No.1 in the morning hours suggested certain corrections in the documents as regards the valuation and description of the item that was to be sent to Dubai. When PW-10 went back to office and told PW-2, PW-2 said that no correction need be made. Thereafter both of them visited Air Cargo Complex. It is in the evidence of PW-10 that he alone went inside the room to meet Accused no. 1 and told him that no corrections possibly could be made as PW-2 was not interested in making the suggested corrections. But Accused no. 1 insisted for carrying out corrections if the item was

to be cleared for its despatch to Dubai. Then PW-10 requested the Accused no. 1 to meet PW-2 but Accused no. 1 retorted saying that whoever he may be, he will not meet him.

10. Be it noted that PW-2 thereafter never visited Air Cargo Complex till he came with the trap party early in the morning on 2.10.1999. PW-2 in his evidence stated that on 2.10.99 PW-10-Dayanadhan came to office at 4.30 a.m. and informed him that he went to the Air Cargo office and found that Accused no. 1 was not on duty and the appellant was on duty. According to PW-2, PW-10 informed him that on inquiry about the cargo the appellant told him that Accused no. 1 has already apprised him about the cargo and accordingly it would be cleared only if Rs.1500/- is brought. PW2 stated in his evidence that he immediately wrote Exh.P2-complaint. He clearly admitted in his evidence that he had no personal knowledge as to what transpired between PW-10 and the appellant at the Air Cargo Office. The evidence of PW-2 about the demand of bribe amount by the appellant is hearsay and therefore inadmissible.

11. Interestingly enough, PW-10 does not support the story narrated by PW-2. According to him when he went to the Air Cargo Complex on 2nd October, PW-2 and another person who came to send the wet grinder was with him and PW-2 asked him to give Rs.1500/- to the appellant saying that it was a loan repayable by PW-2 to Accused no.1. He accordingly collected the money from PW-2 and gave it to the appellant. He in categorical terms accepted that the appellant had never demanded any bribe amount from him. The evidence of PW-10 also suggests that PW-2 was near the import Hall at a distance of about 40 metres between the Air Maldives Godown and import Hall.

12. An analysis of the evidence of PW-2, PW-10 and PW- 11 the official witness reveals the following: a) The prosecution miserably failed to establish the theory of criminal conspiracy hatched by the appellant along with Accused no. 1 to demand and receive gratification; b) The prosecution miserably failed to establish its theory that there was a demand of gratification by Accused no.1 on 1.10.99; c) There is no proof on any demand of gratification by the appellant on 2.10.99; d) The evidence of PW-11, the official witness, Assistant Manager, Vigilance of FCI to the effect all that he heard was appellant asking PW-10 "is it ready?" to which PW- 10 nodded his head. This evidence of the official witness present at the time of trap does not establish that there was any demand of gratification by the appellant. There is no reason to disbelieve the evidence of PW-11; e) Exhibit P-9 post trap mahazar does not record the factum of any demand of gratification by the appellant.

13. The evidence on record suggests that PW10 had given money to the appellant stating that it was a loan repayable by PW2 to accused no.1. The appellant was lulled into that belief based on which he received the amount from PW-10.

14. The fact remains that the prosecution established through evidence of PW-12 and PW-13 and Exhibit P9-post trap mahazar that MO IV series tainted currency notes were recovered from the pocket of the appellant. A question then arises for consideration is that whether the recovery of the tainted money itself is sufficient to convict the appellant under Section 7 of the said Act?

15. The crucial question would be whether the appellant had demanded any amount as gratification to show any official favour and whether the said amount was paid by PW-10 and received by the appellant as consideration for showing such official favour. The only evidence available in this regard is that of PW-10 who did not support the case of the prosecution. The appellant at the earliest point of time explained that it was not the bribe amount received by him but the same was given to him by PW-10, saying that it was towards repayment of loan taken by his Manager-PW2 from the Accused no.1. This is evident from the suggestion put to PW-2 even before PW-10 was examined. Similar suggestion was put to the investigating officer that he had not recorded the version given by the appellant correctly in the post trap mahazar-Exhibit-P9 and no proper opportunity was given to explain the sequence of events.

16. In *Suraj Mal Vs. State (Delhi Admn.) reported in*[1] this court took the view that mere recovery of tainted money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused, in the absence of any evidence to prove payment of bribe or to show the accused voluntarily accepted the money knowing it to be bribe.

17. The learned counsel for the CBI submitted that the onus of proof was upon the appellant to explain as to how he came into possession of the amount recovered from him during the trap. The argument of the learned counsel is obviously based on Section 20 of the Prevention of Corruption Act, 1988 which reads as under:

> "20. Presumption where public servant accepts gratification other than legal remuneration.-
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> (1) Where, in any trial of an offence punishable under Section 7 of 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 a consideration which he knows to be inadequate.
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> (2) Where in any trial of an offence punishable under Section 12 or under clause (b) of section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give 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 a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-sections (1) (2), the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no interference of corruption may fairly be drawn."

18. A three-Judge Bench in *M. Narsinga Rao Vs. State of A.P.*[2] while dealing with the contention that it is not enough that some currency notes were handed over to the public servant to make it acceptance of gratification and prosecution has a further duty to prove that what was paid amounted to gratification, observed:

> ".....we think it is not necessary to deal with the matter in detail because in a recent decision rendered by us the said aspect has been dealt with at length. (Vide Madhukar Bhaskarrao Joshi v. State of Maharashtra.) The following statement made by us in the said decision would be the answer to the aforesaid contention raised by the learned counsel: (SCC p.577, para 12) The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted `as motive or reward' for doing or forbearing to do any official act. So the word `gratification' need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification. This will again be fortified by looking at the collocation of two expressions adjacent to each other like `gratification or any valuable thing'. If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word `gratification' must be treated in the context to mean any payment for giving satisfaction to the public servant who received it."

19. It is well settled that the presumption to be drawn under Section 20 is not an inviolable one. The accused charged with the offence could rebut it either through the cross-examination of the witnesses cited against him or by adducing reliable evidence. If the accused fails to disprove the presumption the same would stick and then it can be held by the Court that the prosecution has proved that the accused received the amount towards gratification.

20. It is equally well settled that the burden of proof placed upon the accused person against whom the presumption is made under Section 20 of the Act is not akin to that of burden placed on the prosecution to prove the case beyond a reasonable doubt.

> "It is well established that where the burden of an issue lies upon the accused he is not required to discharge that burden by leading evidence of proof his case beyond a reasonable doubt. That is, of course, the test prescribed in deciding whether the prosecution has discharged its onus to prove the guilt of the accused; but the same test cannot be applied to an accused person who seeks to discharge the burden placed upon him under Section 4 under the Prevention of Corruption Act. It is sufficient if

> the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur verdict of guilt. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability. As soon as he succeeds in doing so, the burden shifts to prosecution which still has to discharge its original onus that never shifts, i.e.; that of establishing on the whole case the guilt of the accused beyond a reasonable doubt." (See *Jhangan Vs. State*[3]. (Emphasis supplied)

21. It is against this background of principles we have examined the contention of the appellant that the charges under Section 7 of the Act have not been proved against him. It was argued by Shri U. U. Lalit, Senior counsel, that the circumstances found by the High Court in their totality do not establish that the appellant accepted the amount of Rs.1500/- as gratification. Having examined the findings of both the Courts, we are satisfied that the appellant has proved his case by the test of preponderance of probability and we accordingly reach the conclusion that the amount was not taken by the appellant as gratification. He was made to believe that amount paid to him was towards the repayment of loan taken by PW2 from Accused no. 1.

22. The prosecution failed in establishing the guilt of the accused beyond reasonable doubt that the appellant received any gratification.

23. For the aforesaid reasons, we find it difficult to sustain the conviction of the appellant under Section 7 of the said Act. Accordingly, the conviction of the appellant and the sentence imposed upon him is set aside.

24. The appeal is allowed.

25. The bail bonds executed by the appellant for release on bail pursuant to the order dated 04.02.2008 shall stand discharged.

[1]*(1979) 4 SCC 725*
[2]*(2001) 1 SCC 691*
[3]*1966 (3) SCR 736)*