

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AURANGABAD

CRIMINAL APPEAL NO. 376 OF 2000

Vikram s/o Jija Gite,
age 43 years, occ. Service,
R/o Deogaon, Tq. Paithan,
District Aurangabad

...Appellant

VERSUS

The State of Maharashtra

...Respondent

.....
Shri V.D.Sapkal, advocate for the appellant
Smt. V.A.Shinde, A.P.P. for respondent
.....

CORAM : V.M.DESHPANDE, J.

DATE OF RESERVING

THE JUDGMENT : **20.3.2015**

DATE OF PRONOUNCEMENT

OF THE JUDGMENT : **15.4.2015**

J U D G M E N T : -

1] The present appellant is convicted by the learned Special Judge (Anti Corruption), Aurangabad on 22.8.2000 in Special Case No. 2 of 1995.

The appellant is convicted for the offence punishable under Section 7 of the Prevention of Corruption Act, 1988 and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.200/-, in default he is directed to suffer rigorous imprisonment for three months.

The appellant is further convicted for the offence punishable under Section 13 (1)(d) r/w Section 13 (2) of the Prevention of Corruption Act, 1988 and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.500/-, in default he is directed to suffer rigorous imprisonment for six months.

2] The prosecution case is as under : -

On 18.1.1994, PW 1 Limbaji Sonawane lodged his complaint (Exh.24) with Anti Corruption Bureau, Aurangabad. Sum and substance of the said complaint is that, at village Chinchwan he and his brother Kisan are having one agricultural field at Gat No. 154. About three years ago, a well was dug, and therefore, to make entry of the said well in the 7/12 extract an application was made.

It is further stated that he along with his three brothers and mother reside jointly. Another agricultural field Gat No. 151 stands in the name of his brother Kisan. Through the said Gat No. 151 one Anusayabai Khomane, resident of Amthana demanded cart road. In that behalf, the complainant made an application with Tahsil office at Sillod.

When the case of the said cart road was going on, the Talathi of the village (present appellant) took an entry in the 7/12 extract of Gat No. 151 for having 15 feet card road. Therefore, on 31.12.1993 he gave an application with the Deputy Collector, Sillod.

The complaint further proceeds that on 12.1.1994 he along with his brother Kisan and one Vitthal met appellant and asked as to

how there could be entry in the 7/12 extract about cart road when the dispute is going on in the Tahsil office and also when the application for taking entry of well is given why the entry of the said well is not taken. The complaint further recites, upon that the appellant asked complainant Limbaji that he should give an application on which he will take necessary entry in 7/12 extract regarding well and will mention 8 feet cart road instead of 15 feet, however, for that the complainant will have to give Rs.600/-. The complaint further states that, he pleaded that he is poor. Therefore, ultimately the appellant was ready to accept Rs.300/- from the complainant.

The complaint further proceeds that, on 14.1.1994 the complainant met the appellant at his residence and asked about his work. That time, appellant asked as to whether he has brought the money. Thereupon, the complainant told that arrangements for money is yet to be made. Then the appellant asked the complainant to come to his office on Wednesday with Rs.300/-, then he will take necessary note in the 7/12 extract.

Upon receipt of the complaint (Exh.24), the Anti Corruption Bureau, Aurangabad called two panchas, namely Kashinath Kale (PW 2) and Shri Bawaskar. Both of them were directed to attend the Anti Corruption office on 19.1.1994. After consent from the panchas to act in the said capacity, they read the written complaint of the complainant. Thereafter demonstration of use of lamp and anthracene powder was shown to them. Anthracene powder was applied to the notes of Rs.300/- i.e. three currency notes of Rs.100/-

each. The said notes were kept in the left side pocket of the shirt of the complainant.

PW 2 Kashinath was instructed to remain with the complainant at the time of trap and to listen the conversation between the appellant and the complainant. Necessary instructions were also given to Panch No.2 and the members of the raiding party. Accordingly, a pre-trap panchanama (Exh.28) was prepared.

The prosecution case further proceeds that thereafter the complainant along with panch and staff of the Anti Corruption Bureau left the office of Anti Corruption Bureau for village Amthana by jeep. On reaching Amthana, vehicle was parked on Phata. From there, PW 2 Kashinath and complainant proceeded to the office of the appellant. They were also followed by the staff of the Anti Corruption Bureau and another panch.

On reaching the office of the appellant, Limbaji (PW 1) said, "Namaskar" to the appellant. Upon that, Kashinath (PW 2) realised that he is the person who is Talathi. Upon that the appellant asked them to sit on satranji. Thereafter Limbaji made inquiry about his work to the appellant. Thereupon, the appellant took one blank 7/12 extract and made entry of the said well in the said 7/12 extract. It is further case of the prosecution that thereafter the appellant asked Limbaji whether he has brought Rs.300/- as agreed. Thereupon Limbaji removed the tainted currency notes from his pocket and held in front of the appellant. The appellant asked accused no.2 Sandu (who died even prior to framing of the charge) to accept the said

money. Sandu accepted the money and kept in the left pocket of his shirt. Thereafter Limbaji went and gave signal to the raiding party. Thereafter, the staff of the raiding party came in the office. The prosecution case further proceeds that post trap panchanama (Exh.29) was drawn. Certain record from the possession of the appellant was seized.

Thereafter Sheshrao Suryawanshi (PW 6) lodged the report (Exh.49) with Sillod (Rural) police station. PW 6 Suryawanshi recorded statement of the complainant. He also recorded statements of both the panchas and thereafter the investigation papers were given to Police Inspector Shri Nalawade for further investigation. Shri Nalawade recorded statement of remaining witnesses and collected relevant documents regarding the inquiry of cart track from the Tahsildar. He submitted proposal for sanction. On receipt of sanction order from the Sub-Divisional Officer, Shri Nalawade filed the charge sheet against the accused.

3] Original accused no.2 Sandu Bapu Chaudhary died on 2.6.1997. His death certificate is at Exh.15.

4] Charge was framed by the learned Special Judge on 1.7.1999 against the appellant alone. It is at Exh.16.

The appellant was specifically charged that, he on 12.1.1994 and on 14.1.1994 attempted to obtain a sum of Rs.300/- for himself. The appellant is also charged that on 19.1.1994 he attempted to

obtain and accepted sum of Rs.300/- for himself through deceased accused no.2 Sandu Chaudhary from Limbaji Sonawane as gratification other than legal remuneration as a motive or reward in the matter for effecting entry of well in 7/12 extract of Gat No. 154 and thereby committed offence punishable under Section 7 of the Prevention of Corruption Act, 1988.

The appellant was further charged that he committed misconduct and obtained pecuniary advantage, to wit a sum of Rs.300/- on 19.1.1994 through accused no.2 Sandu from Limbaji by corrupt mean and otherwise abused his position as a public servant and thereby alleged to have committed offence punishable under Section 13 (2) r/w 13 (1)(d) of the Prevention of Corruption Act, 1988.

5] The appellant denied the charge and claimed for his trial.

6] In order to bring home the guilt of the appellant, the prosecution has examined in all eight witnesses and also relied upon the documents which were proved during the course of the trial.

7] The learned Judge of the court below, after the end of the trial, found that the prosecution has proved its case against the appellant, and therefore, convicted the appellant and also directed him to suffer sentence as observed in the opening paragraph of this judgment. Hence, this appeal.

8] I have heard Shri V.D.Sapkal, learned counsel for the appellant and Smt. V.A.Shinde, learned Additional Public Prosecutor for the respondent/State. Both the learned counsel as well as learned Additional Public Prosecutor took me through the notes of the evidence in detail and also the entire record of the case in detail.

9] The submission of the learned counsel Shri V.D.Sapkal is having two limbs. Firstly, according to him, the prosecution has utterly failed to prove that there was any demand from the appellant. According to him, from the quality of the evidence, as available on record, it is crystal clear that the prosecution could not bring home the guilt of the appellant on the said count. According to him, the evidence of the prosecution witnesses in respect of the demand is inconsistent with each other, and therefore, at least there is doubt about the said demand. The second limb of the argument of the learned counsel is about the sanction. According to him, the sanction order (Exh.51/A) is not issued by the competent authority, and therefore, in absence of valid sanction the prosecution must fail.

10] Per contra, learned Additional Public Prosecutor strenuously urged before me that, in view of the evidence of PW 1 Limbaji and PW 2 Kashinath, there cannot be any doubt about the demand of money. Therefore, she submitted that the appeal needs to be dismissed.

11] Number of reported cases were placed before this court by both the sides in respect of sanction.

12] Let us scrutinize the prosecution case in respect of demand. The appellant is convicted for the offence punishable under Section 7 of the Prevention of Corruption Act, 1988.

The appellant is specifically charged that, on 12.1.1994 and 14.1.1994 he attempted to obtain a sum of Rs.300/- from PW 1 Limbaji and on 19.1.1994 he attempted to obtain and accepted the sum of Rs.300/- for himself through deceased Sandu Chaudhary.

Complaint (Exh.24) recites that on 12.1.1994, the complainant Limbaji had been to the office of the appellant along with his brother Kisan and one Vitthal Muktaji Rawale. At that time, Rs.300/- were demanded. Also in the complaint it is stated that on 14.1.1994 the complainant had been to the house of the appellant and that time the appellant has demanded Rs.300/-.

13] The complaint is not a substantive piece of evidence. The recitals in the complaint can be used for corroboration or for contradiction. The demand on these two dates has to be proved by the substantive evidence. The said evidence should be of such nature that it should inspire confidence about its truthfulness.

Though in the complaint (Exh.24) complainant Limbaji has stated that on 12.1.1994 he had been to the office of the appellant along with his brother Kisan and one Vitthal Muktaji Rawale. The

said Independent witness Vitthal Muktaji Rawale is not examined. One Vitthal Muktaji Khale is examined as Prosecution Witness No.5, however, there is nothing available on record to show that this Vitthal Muktaji Khale is also known as Vitthal Muktaji Rawale. Thus, independent person Vitthal Muktaji Rawale, whose name is appearing in complaint (Exh.24) is not examined by the prosecution.

14] The evidence of Limbaji (PW 1) from the witness box is completely silent as to on what date firstly the appellant had made demand. Paragraph no.2 of his examination-in-chief recites as under :-

“2) I requested the accused no.1 to modify the entry of cart track by reducing its width to 8 ft. and to make entry of the well in the 7/12 extract of G. no. 154. The accused no.1 demanded Rs.600/- from me for making those entries. I told him that I could not give him that much of amount as I was poor. Thereafter, he insisted for payment of Rs.300/-. I agreed to pay him Rs.300/-.”

From the aforesaid, it is clear that the complainant Limbaji is totally silent from the witness box as to; (1) date, (2) the place of demand, and (3) time of demand. Further his evidence is conspicuously absent in respect of the presence of his brother Kisan and Vitthal Rawale.

Kisan is examined by the prosecution, however, his evidence is of little use to the prosecution, in view of evidence of complainant Limbaji, who is totally silent about the presence of his brother when demand was firstly made by the appellant.

In so far as demand on 14.1.1994 is concerned, complainant Limbaji has not stated from the witness box that on 14.1.1994 he met appellant at his residence. What he has stated is that, after 2-3 days from first demand he had been to the residence of the appellant at Sillod. This second demand is not made in any one's presence.

Further, the reason for visiting the residence of the appellant by Limbaji (PW 1) is not forthcoming on record. It is not the case of the complainant that after the first demand in the office, the complainant was asked by the appellant to meet him at his residence.

Further, what amount the complainant has to pay to the appellant was agreed on the first visit at the appellant's office and as per the prosecution case, the deal was settled at Rs.300/-. It is even the prosecution case that, when the complainant Limbaji met the appellant at his residence, that time the agreed money of Rs.300/- were not arranged for. Further, from the prosecution case and from the evidence of the complainant, it is clear that at his residence the complainant did not plead for reduction of the agreed amount from Rs.300/-. Thus, there was no occasion or reason for the complainant to visit the house of the appellant in respect of his work. It is also not the case of the prosecution that at any point of time the appellant asked the complainant to visit his house, so that the appellant will complete his work from his house itself. In that view of the matter, the uncorroborated version of complainant Limbaji that, he visited the house of the appellant and then on second occasion the

demand was made is necessarily to be rejected.

15] Once a specific charge was framed against the appellant that on 12.1.1994 demand was made by the appellant, it was obligatory on the part of the prosecution to adduce reliable evidence of complainant Limbaji that on 12.1.1994 he visited the office of the appellant. According to the complainant, both as per his complaint (Exh.24) and from his version from the witness box, Rs.300/- were demanded by the appellant for taking two entries in respect of the two different Gat Numbers i.e. (1) for taking entry of well in Gat No.154, and (2) for reduction of cart way from 15 feet to 8 feet in Gat No.151.

As observed earlier, complainant Limbaji is totally silent in his deposition before the court about the presence of his brother Kisan and Vitthal Rawale. It is not the case of the prosecution that the present appellant demanded amount jointly from both Limbaji and his brother Kisan. The prosecution case is that demand was made to Limbaji alone.

Kisan (PW 4) is examined. His evidence is totally silent that on the first occasion when he had been with the complainant to the office of the appellant, that time the appellant demanded Rs.300/- for taking two entries in respect of Gat Nos. 154 and 151. His evidence would reveal that the demand was made only for taking entry about the well in Gat No.154.

16] If the complainant was accompanied by his brother Kisan when he met the appellant at his office and when in his presence demand was made, normally this important aspect about the presence of his brother and the demand in the presence of his brother by the appellant would not have been missed by the appellant. From the evidence of Limbaji, his education qualification is 10th fail, however, he works in a factory. Thus, it is clear that it could not be said that Limbaji is totally rustic person and is having no knowledge about the worldly affairs. In that backdrop, it is unbelievable that from the witness box he would not record the presence of his brother and the demand by the appellant in his brother's presence.

Once it is found that very presence of Kisan in the office of the appellant is not revealed and/or not disclosed by the complainant, evidence of Kisan would be of little use for the prosecution.

17] That takes me to the demand on the day of the trap. Trap was laid on 19.1.1994. PW 2 Kashinath Kale was asked by Anti Corruption Bureau officials to remain with the complainant. He was asked to remain with the complainant constantly and to listen the conversation between the appellant and the complainant Limbaji.

The evidence of Limbaji (PW 1) and Kashinath (PW 2) corroborates each other in respect of their visit on 19.1.1994 to the office of the appellant and that time after the exchange of pleasantries they were asked by the appellant to sit on a satranji i.e. mattress on

the floor. There is also corroboration from Kashinath to the version of PW 1 Limbaji that thereafter he made inquiry with the appellant about the entry of the well in 7/12 extract and cart track entry. There is also due corroboration from Kashinath (PW 2) to the version of Limbaji that the appellant thereafter took out one 7/12 extract and filled up the blank 7/12 extract with necessary particulars by making entry of well and also that the appellant then said that entry in respect of the cart track would be made subsequently. Both, the complainant and panch witness do not differ on the aspect that the appellant gave the 7/12 extract to the complainant. However, there is stark variance in the respective evidence of PW 1 Limbaji and PW 2 Kashinath about the demand. It would be useful to reproduce the same. Limbaji (PW 1) has stated from the witness box as under : -

“ He filled blank 7/12 extract with necessary particulars and by making entry of well and gave it to me.

.....
When I started leaving his office, the accused told me that he would not allow me to go out of the office, unless I paid him money.”

The version of Kashinath (PW 2) is as under : -

“ On making entry of well in 7/12 extract, the accused gave it to the complainant. Then accused asked the complainant whether he had brought Rs.300/- as agreed. ”

From the afore said, it is crystally clear that the element of demand is completely absent in the evidence of PW 1 Limbaji the complainant. On the contrary, it smacks as if the appellant has given threat to the complainant.

Thus, about the demand and about the amount both these witnesses are at stark variance. Further, in cross-examination PW 2 Kashinath has stated as under : -

“ We came to Talathi office at about 1.30 p.m. and left it to 5.30 to 6.30 p.m. The excluding the contents of the panchanama regarding conversation, I cannot tell the conversation which took place during the said period between the other persons and between me and others. I had read the panchanama before giving the evidence.”

From the aforesaid, two things are emerging.

(1) PW 2 Kashinath has shown a complete ignorance about the conversation that took place during the period of 1.30 p.m. to 5.30 p.m. between him and others.

(2) He is sure about the conversation only with the appellant and the complainant Limbaji which has found place in the panchanama (Exh. 29), which he has read before giving evidence.

18] Refreshing memory by the witness cannot have any objection, however, such reading of a document for refreshing the memory has to be done in the presence of the court. Such is the view of learned Single Judge of this court in **Sharad vs State of Maharashtra**, reported in **2006 (2) Mh.L.J.(Cri.) 1210** and in **Criminal Appeal No. 408 of 2012 [Suresh vs State of**

Maharashtra] delivered by the Division Bench (**Coram : B.R.Gawai and V.M.Deshpande, JJ.**)

In the present case, there is nothing available on record to show that Kashinath (PW 2) has refreshed his memory by going through the panchanama (Exh.29) in the presence of the court. In that view of the matter, to that extent his evidence needs to be discarded.

19] Further, the claim by the complainant Limbaji that the appellant has asked him that unless amount is paid he will not allow him to go out of office is the omission which is duly proved by the investigating officer PW 6 Sheshrao Suryawanshi. Thus, for the first time in the court from the witness box the complainant is making the said tall claim which is also not having any corroboration from witness PW 2 Kashinath.

20] Both Limbaji and Kashinath disclosed in their evidence that the appellant took one blank 7/12 extract. It was filled in by him and entry in respect of well is taken. The investigating officer has seized various documents including the 7/12 extracts. Two 7/12 extracts are available on record in respect of Gat No.154. Exh.25, a 7/12 extract in respect of Gat No. 154, has a reference of well; whereas Exh. 35, which is also a 7/12 extract in respect of Gat No. 154, is completely silent about the said mention. What is important is that PW 2 Kashinath has stated as under : -

“ The 7/12 extract at Exh.35 was prepared by the accused no.1 on the day of trap.”

That creates a serious doubt in the mind as to really on the day of the trap Exh.25 was prepared by the appellant, it was handed over to the complainant and thereafter the amount was demanded as claimed by both the prosecution witnesses. If the prosecution case is to be believed on the day of the trap, the entry in 7/12 extract about the well was taken and thereafter the amount was demanded. In that backdrop Exh.35, which even according to PW 2 Kashinath was prepared by appellant on the day of the trap assumes importance, because it does not have any mention about the well. Further both the complainant and panch are not claiming that on the day of the trap two 7/12 extracts were prepared by the appellant. In that view of the matter, it is really doubtful, whether really Exh.25 was prepared by the appellant, handed it over to the complainant and amount was demanded.

21] Admittedly, it is not the prosecution case that the tainted amount was accepted by the present appellant. Even according to the prosecution, the amount was accepted by deceased accused no.2. In the present case, on the afore said evaluation, this court is of the view that the prosecution has utterly failed to prove the demand on 12.1.1994 at the office of the appellant, on 14.1.1994 in the evening at the residence of the appellant and on the day of the trap i.e. on 19.1.1994. Therefore, the conviction of the appellant is

unsustainable.

22] Since this court is of the view that the prosecution has utterly failed to prove the demand by the appellant and appeal needs to be allowed on the said count alone, the further discussion in respect of the sanction is not warranted.

23] The afore said discussion leads me to pass the following order.

- (i) Appeal is allowed.
- (ii) The judgment and order of conviction, passed by the Special Judge (Anti Corruption) Aurangabad, dated 22.8.2000 in Special Case No. 2 of 1995 is quashed and set aside.
- (iii) The appellant is acquitted of the offences with which he was convicted.
- (iv) The fine amount, if any paid by the appellant, be refunded to him.

(V.M.DESHPANDE, J.)

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