

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1152 OF 2004

RAVINDRA MAHADEO KOTHAMKAR)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Shri M.J.Bandgar a/w. Shri Ujjwal Agandsurve, Advocate for the Appellant.

Smt.S.V.Gajare-Dhumal, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 9th OCTOBER 2015.

JUDGMENT :

1 The appellant, a Tax Recovery Clerk, serving with the Municipal Corporation at Thane, was prosecuted on the allegation of having committed offences punishable under Section 7 and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (P.C.Act). The learned Special Judge

(appointed under Section 3 of the P.C.Act) after holding a trial found him guilty of the aforesaid offences. The learned Special Judge sentenced the appellant to suffer Rigorous Imprisonment for 1 year and to pay a fine of Rs.1500/- on each of the said two counts, with default sentences of Rigorous Imprisonment for 6 months. The learned Special Judge directed that the substantive sentences would run concurrently.

Being aggrieved by his conviction and the sentences imposed upon him, the appellant has approached this court by filing the present appeal.

2 I have heard Shri M.J.Bandgar, the learned counsel for the appellant. I have heard Smt.S.V.Gajare-Dhumal, the learned APP for the State. I have gone through the entire evidence adduced during the trial. I have also carefully gone through the impugned judgment.

3 The prosecution case, as put forth before the trial court, in brief, be stated thus :

Nandkumar Borade (hereinafter referred to as 'the complainant') (PW1) owns houses bearing nos.298 and 299 at Kolshet, Thane. His houses are assessed for taxes by the Thane Municipal Corporation. The Thane Municipal Corporation improved the road passing from in front of the houses of the complainant by making it of cement concrete. This resulted in raising the height of the said road, and consequently, the houses of the complainant became low. The complainant apprehended that the rain water would enter his houses, and therefore, raised the height of his houses. On 5th June 1999, when the repairs and the construction work as undertaken by the complainant was going on, the appellant Tax Recovery Clerk, came to his house and asked him whether he had taken permission of the Thane Municipal Corporation for the repairs. The complainant stated that he had not taken any such permission, but added that, he had not carried out any new construction and had only increased the height of the houses. The appellant then said that even for carrying out repairs, permission of the Corporation would be necessary, and since the complainant had not taken such permission, the appellant could

ask the construction to be demolished. The appellant asked the complainant to meet him in his office on 7th June 1999. The complainant agreed to meet him accordingly, but actually could not go to the office of the appellant, due to some other work. On 8th June 1999, the appellant again came to the house of the complainant, and asked him as to why the complainant did not come to the office. The complainant replied that it was because he had no time. The appellant, then, said that, the complainant had carried out repairs without obtaining a legal permission for the same, and that, the complainant should pay him an amount of Rs.1,000/-. The appellant also said that unless the said amount would be paid, the appellant would report the matter to the Encroachment Department, and get the construction demolished. The complainant, then, pleaded with him not to do so, as he would suffer great loss, and that, he did not have so much money at that time. The appellant, then, asked him to come to his office on the next day i.e. on 9th June 1999, at about 2.00 p.m., and give an amount of Rs.1,000/-, and again threatened that otherwise he would report the matter to the Encroachment Department.

The complainant, then, realized that unless he would pay an amount of Rs.1,000/- as bribe to the appellant, he would take action for demolition of the construction, and that, therefore, he reported the matter to the Anti Corruption Bureau (ACB). His complaint (Exhibit 9) was noted down by Arun Salunke, Inspector of Police, attached to ACB Unit, Thane (PW3). Salunke immediately decided to lay a trap. He called two panchas Vishal Godbole (PW2) and one Chaudhary. The panchas were introduced to the complainant. The complainant narrated the gist of his complaint to the panchas. The complaint was shown to the panchas, who put their signatures below the same. An amount of Rs.1,000/- out of the cash of Rs.1100/-, which the complainant was having, consisting of currency notes of Rs.100/- each, was taken from the complainant. Anthracene powder was applied to the currency notes and the qualities thereof with demonstration were explained to the panchas and the complainant. The panch Godbole (PW2) was to accompany the complainant and panch Choudhary was to remain with the raiding party at the time of the trap. The complainant was instructed to hand over the tainted

amount only on a demand made by the appellant. Pre-trap panchnama (Exhibit 21) was drawn. The complainant was to give a signal to the raiding party after handing over the bribe amount.

4 The police party and the panchas went to the Ward office by a police jeep, where the appellant was working. They reached there at about 2.00 p.m. The complainant and Godbole went ahead. The other members of the raiding party were following them. When the complainant and panch entered the office, the appellant was present. The complainant greeted him. The appellant was taking lunch. He asked the complainant to sit. After his lunch, he asked the complainant to come to a hotel for taking cold drink. Thereafter, the complainant, Godbole and the appellant went to Hotel Sairam situate nearby. On the way, the appellant asked the complainant as to whether he had brought the amount, to which the complainant replied in affirmative. The three then went inside the hotel. The appellant ordered *lassi* for all three of them. While having *lassi*, the complainant asked the appellant of the step he was to take about the construction. The

appellant then answered that he was not going to report against the complainant. The appellant paid the bill. When all of them came out of the hotel and travelled some distance, the appellant asked the complainant to give the money. The complainant then handed over the tainted amount to him. The appellant accepted the same and kept it in his pant pocket. On the complainant giving the predetermined signal, P.I.Saluke (PW3) reached there, held the hands of the appellant and introduced himself and the members of the raiding party to the appellant. The tainted amount was recovered from the appellant. When examined under ultra violet rays, traces of anthracene powder were noticed on the right hand and right pant pocket of the appellant. The appellant was apprehended and after completion of investigation, charge-sheet was filed against him, pursuant to which he was prosecuted and convicted as aforesaid.

5 Mr.Bandgar contended that the prosecution case was not believable. He submitted that there were material discrepancies in the evidence of the prosecution witnesses. He also

submitted that no verification of the demand, allegedly made by the appellant, was made, before laying of the trap. He submitted that the defence of the appellant which had been taken by him in the trial court by filing the written statement, was acceptable, and at any rate, plausible. The defence of the appellant was to the effect that he had not made any demand of any gratification, and that, since the complainant apprehended that the appellant would lodge a complaint regarding the unauthorized construction carried out by the complainant, he made a false report to the ACB, got a trap laid, and thrust the tainted amount in the pant pocket of the appellant.

6 Shri Bandgar also submitted that the sanction to prosecute the appellant, as granted by Kalyaneshwar Bakshi (PW4), who was the Municipal Commissioner of Thane Municipal Corporation at the material time, is not valid or legal. It is submitted that the same has been granted without application of mind. Shri Bandgar contended that the learned Special Judge ought to have acquitted the appellant.

7 The learned APP submitted that the evidence of the complainant, the panch, and the Investigating Officer Salunke, is consistent and without any infirmities. According to her, their evidence clearly indicates that the appellant had made a demand of bribe, and that, the tainted amount was duly accepted by him, whereafter he was immediately trapped. According to her, the order of conviction as recorded by the learned Special Judge and the sentences imposed by him upon the appellant, being proper and legal, need no interference.

8 It is apparent that the complainant had carried out unauthorized construction work. Though the complainant has attempted to term it as repair work, a reading of his evidence leaves no manner of doubt, about the unauthorized character of the construction work done by him. In the cross-examination, he admitted that he raised the height of the structure by 3 feet and even the door was re-erected at a higher level. He also admitted that his brother had constructed an upper floor to the house

without obtaining permission. In the cross-examination of the complainant it has been brought on record that, on the date on which he filed the complaint with the ACB, the construction work was going on. Thus, that the complainant is a person who had made unauthorized construction and that such construction was liable to be demolished cannot be doubted at all.

9 In appreciating evidence in trap cases, the character of the complainant assumes importance. The judicial pronouncements have recognized that there are various types of complainants. There are some complainants who basically want some favour from a public servant illegally and because of the refusal of the public servant to oblige him, decide to lodge a complaint against him. There are other types of complainants whose genuine and legitimate work is unnecessarily held up by a public servant with the object of obtaining illegal gratification from such complainants. In this case, the complainant, admittedly, being a person who had acted contrary to law and who faced the danger of inviting action by the local authorities

against the unauthorized construction work carried out by him, his evidence needs to be scrutinized with due care.

10 The complaint (Exhibit 9) shows that the demand of money was made by the appellant on 5th June 1999 for the first time, and then, on 8th June 1999, at about 2.00 p.m. The amount was to be paid in the office of the appellant by 2.00 p.m. on 9th June 1999. In his evidence, however, the complainant states about the appellant coming to his house on 8th June 1999 only in the evening. The significance of this shall be discussed at a later stage.

11 What happened actually is not what was expected. When the complainant went to the office of the appellant with the money, as allegedly demanded by the appellant on the previous date, the appellant did not ask for money. On the contrary, he asked the complainant to come to a hotel for having cold drink, and it is only on the way that he, allegedly, asked the complainant whether he had brought the amount, as had been told to him.

When the complainant answered in affirmative, the appellant still did not demand the amount and went along with him and the panch inside the hotel. He did not question the presence of Godbole along with the complainant and did not bother to ask him as to who that person was. The evidence of the panch Godbole does support this version of the complainant, but it cannot be overlooked that Godbole had previously also acted as a panch on about 3 to 4 occasions, as admitted by him. That, the appellant, who wanted to take money from the complainant, should not feel the presence of Godbole suspicious, and would not even ask the complainant as to who he was, and why was he with him, is difficult to accept.

12 There are some material variations about the place where the tainted amount was accepted by the appellant. According to the complainant and the panch, the same was accepted after all three of them had *lassi* in the hotel and were coming back to the office of the appellant. The money was not demanded by the appellant or paid by the complainant in the

hotel. According to the complainant, the appellant was apprehended exactly in front of a pan shop near Sairam hotel. The complainant gives his estimate of the distance between the place where the appellant was caught and the pan shop as 30 feet. According to him, the pan shop is about 40 to 30 feet away from the hotel. The panch, however, says that the place where the bribe was accepted, was about 50 feet away from Sairam hotel towards the east. Indeed, these discrepancies would not matter very much, but the Investigating Officer Salunke has a totally different version. According to him, when the complainant, panch and the appellant came out of the office of the appellant and went to Sairam hotel, he and other members of the trap laying party, followed them. It is an admitted position that the Investigating Officer and the other members of the trap laying party had not entered the said Sairam hotel and were waiting outside. According to Salunke, the complainant came out and gave a signal, whereafter Salunke rushed inside the hotel and caught hold of the appellant and took him to the Municipal office. Though I am not inclined to give much importance to the

discrepancies in the distance between the place where the appellant was apprehended and Sairam hotel and / or pan center, the discrepancy about whether the appellant was apprehended inside the hotel or outside the hotel, is a major one, and cannot be lightly ignored.

13 In this background, the factors that the complainant himself was a law breaker, and that, there had been no previous verification of the demand allegedly made by the appellant, render it difficult to accept the version of the prosecution as put forth. The evidence about acceptance of the bribe by the appellant is not consistent or reliable. This doubt is further strengthened because of the following :-

It may be recalled that in his complaint, the complainant had spoken about the appellant having visited his house on 8th June 1999 at 2.00 p.m. In the evidence, however, he said that the appellant had come to him on 8th June 1999 *in the evening*. The evidence reveals that on 8th June 1999 the appellant had gone to the house of the complainant with his superior one

Kashiram Gavli. The Investigating Officer Salunke did admit that the investigation had revealed that the appellant and Gavli had gone to the house of the appellant at about 2.00 p.m., and that, the complainant was present there. The contention of the appellant was that he could not have demanded a bribe in the presence of his superior. This contention was put forth before the learned Special Judge, who, however, discarded it by observing that the appellant *might have gone to the house of the complainant on two occasions on 8th June 1999*. The learned Judge also observed that the complainant stated that he did not remember whether the appellant was accompanied by any other persons on 8th June 1999, but further observed that the visit of the appellant with his superior was at about 2.00 p.m. as revealed by the Investigating Officer, but the complainant spoke about the visit of the appellant and his demand for bribe in the evening. *To reconcile, the learned Judge himself invented the possibility of the appellant having visited the house of the complainant twice on 8th June 1999, though it was not the case of the complainant at all, that the appellant had gone to him twice on that date.* Admittedly, the

said Gavli passed away during the trial and could not be examined as a witness for the defence by the appellant.

14 When the trap was being laid without verification of the demand, it was essential to have truly independent witnesses as panchas. However, admittedly, panch Godbole had previously acted as a panch for the ACB on about 3 to 4 occasions. Selecting such a panch casts doubt on the sincerity of the investigating agency, particularly, because the trap was laid hurriedly and without verification of the demand.

15 A perusal of the impugned judgment shows that the learned Special Judge has proceeded on the *presumption of guilt* as opposed to the *presumption of innocence*. He noticed some inconsistencies and variations in the versions of the complainant and the panch Godbole, but did not give any importance to those variations by observing that “it was likely that the panch witness either did not hear attentively what the accused actually spoke or did not remember.” Regarding the other discrepancies between

the evidence of the witnesses as to the spot where the appellant was apprehended, the learned Judge observed that 'having regard to the mental state of the witnesses, there was a likelihood of they being confused about the place of acceptance of the bribe and place of catching the appellant' (paragraphs 23, 25 and 26 of the impugned judgment). The learned Judge also reasoned that, that the complainant and panch Godbole had approached the appellant and that the appellant took them to the hotel, offered them *lassi* etc. was admitted. He thought this to be corroborating the evidence of the prosecution witnesses forgetting that corroboration was required not with respect to these happenings, but with respect to demand and acceptance of bribe. When as per the prosecution case the appellant had asked the complainant to pay the bribe to him in the office, that he did not demand it there and instead took the complainant out in a hotel, is actually a factor weakening the case of the prosecution, but the learned Judge has held the same aspect as favourable to the prosecution. The learned Judge posed a question as to, 'why the appellant found it necessary to take the complainant and panch to the hotel

and offer them *lassi* and oblige them, was not explained', and that, 'mere fact of acquaintance was not sufficient to take him to the hotel.' The learned Special Judge observed that, the fact that the appellant took them to the hotel, itself creates suspicion regarding the defence of the appellant.

16 In my opinion, the following factors -

- (a) that, there had been no verification of the demand before laying of a trap;
- (b) that, the trap was laid as soon as the complaint was made and rather hurriedly;
- (c) that, the details regarding the manner and the place of acceptance of the bribe amount given by the prosecution witnesses differ,

it was not safe to hold the appellant guilty of the alleged offences. At the cost of repetition, it must be observed that in trap cases under the P.C.Act, the character of the complainant assumes significance and in the instance case, the complainant himself was, admittedly, a law breaker.

17 However, there is a more preliminary and primary aspect of the matter which was not at all considered by the trial court, or even raised before this court. The accusation against the appellant is that, he had demanded illegal gratification for *not reporting the matter to the Encroachment Department*. This is the case of the prosecution itself, and even the charge framed by the learned Special Judge is in accordance with this theory of the prosecution. A bare reading of Section 7 and Section 13 of the P.C.Act indicates that the demand of illegal gratification must be on account of an official act and the favour or dis-favour must be done in the exercise of official functions, and that, the obtaining of a valuable thing or its pecuniary advantage must be by corrupt or illegal means or by abusing one's position as a public servant. Here, the act in respect of which the bribe was to be paid, *was the act of not reporting the matter to the Encroachment Department*. The favour that was to be done was *by not reporting the matter to the Encroachment Department*.

18 The official act or official function referred to in the relevant provisions obviously mean *acts or functions which the concerned public servant can perform in his official capacity and not in the capacity of a private citizen*. The appellant, admittedly, was working as a Tax Recovery Clerk in the Thane Municipal Corporation and had nothing to do with the demolition of the illegal constructions. *The not reporting of the matter to the Encroachment Department, which was said to be the act for which bribe was being demanded, cannot be said to be an official act of the appellant in his capacity as a public servant*. The favour which the appellant was to show to the complainant in return for the bribe, viz., 'of not reporting the matter to the Encroachment Department', had nothing to do with the official duties of the appellant. Not reporting of the matter would be an act performed by the appellant in his private capacity and not in his official capacity. When the complainant had made illegal construction, it could be reported to the Encroachment Department *by any person*. The appellant had nothing to do with the work of the

Encroachment Department and there is not even an assertion to that effect. The work carried out by the complainant was obvious and could be noticed by anyone. For reporting or not reporting such matter, anybody could similarly demand gratification from the complainant. The appellant's position as a Tax Recovery Clerk in the Thane Municipal Corporation, in no manner gave the status of an official act to his not reporting the matter to the Encroachment Department. Thus, what the appellant allegedly agreed to do in return for a bribe was not his official act and was an act purely in his personal capacity, to which the provisions of the P.C.Act do not apply.

19 The judgment and order of conviction, as recorded by the learned Special Judge, is not in accordance with law. The same is, therefore, required to be interfered with.

20 The appeal is allowed.

 The impugned judgment of conviction and the sentences imposed upon the appellant are set aside.

The appellant is acquitted. His bail bonds are discharged.

Fine, if paid, be refunded to him.

21 The appeal is disposed of in the aforesaid terms.

(ABHAY M. THIPSAY, J.)

CERTIFICATE

**Certified to be true and correct copy of the original
signed Judgment /Order.**