

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.UBAID

THURSDAY, THE 9TH DAY OF JULY 2015/18TH ASHADHA, 1937

CRL.A.No. 124 of 2003 ()

CC.NO. 5/2001 OF SPECIAL JUDGE (SFE/CBI)-I, ERNAKULAM

APPELLANT/ACCUSED :

**N.S.NAIR, ACCOUNTANT, AIR-FORCE CANTEEN
PULAYANARKOTTAH, TRIVANDRUM
(S/O.SRI. P.NARAYANA PILLAI, T.C.16/768, (V)
KOCHAR ROAD, JAGATHI, TRIVANDRUM.**

**BY SENIOR ADVOCATE SRI.S.GOPAKUMARAN NAIR
BY ADV. SRI.SOORAJ T. ELANJICKAL**

RESPONDENT(S)/COMPLAINANT:

**1. SUPERINTENDENT OF POLICE,
C.B.I. COCHIN - 17,
REPRESENTED BY THE STANDING COUNCIL FOR CBI,
HIGH COURT, ERNAKULAM.**

**2. STATE,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.**

**R1 BY ADVS. SRI.P.CHANDRASEKHARA PILLAI, SC
SRI.S.SREEKUMAR, SC
R2 BY PUBLIC PROSECUTOR SRI. N. SURESH**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26-06-2015,
THE COURT ON 09-07-2015 DELIVERED THE FOLLOWING:**

Mn

P.UBAID, J.

CR

Crl. A No.124 of 2003

Dated this the 9th day of July, 2015

J U D G M E N T

The appellant herein was a civilian in the Air Force. He had worked as a temporary accountant in the canteen attached to the Thiruvananthapuram unit of the Air Force. After his retirement in October 2000, he was appointed as a temporary staff on daily wages to assist the main accountant in the Unit Run Canteen. On the complaint of one Dileep Kumar, who was employed on daily wages in the Unit Run Canteen of the Thiruvananthapuram Air Force, that the appellant demanded an amount of ₹15,000/- as illegal gratification for making him permanent, the Kochi Wing of Central Bureau of Investigation (CBI) registered a crime against the appellant. A trap was accordingly arranged by the officer of the CBI, and the amount of ₹12,000/- brought by the complainant Dileep Kumar was received as per mahazar for trap purposes. After demonstrating phenolphthalein test, Dileep Kumar was instructed by the CBI officer to handover the phenolphthalein tainted currency of ₹12,000/- to the appellant at his office. Accordingly, the complainant, along with another

public servant arranged by the CBI officer to witness the trap went to the office of the accused on 8.3.2001 and paid the amount. Within no time the CBI team lead by the CBI Inspector reached at the office of the accused on getting pre-arranged signal, the CBI officer seized the phenolphthalein tainted currency from the possession of the accused, and arrested him on the spot. After investigation, the CBI submitted final report before the learned Special Judge (SPE/CBI)-I, Ernakulam.

2. The appellant herein faced trial before the learned trial judge in C.C No.5/2001. He pleaded not guilty to the charge framed against him by the learned Special Judge, under Sections 7 and 13(2) r/w 13(1)(d) of the Prevention of Corruption Act (for short 'the P.C Act') and he claimed to be tried. The prosecution examined seven witnesses in the trial court and also marked Exts.P1 to P7 documents and MO1 to MO6 properties including the phenolphthalein tainted currency. When examined under Section 313 Cr.P.C, the accused denied the incriminating circumstances, and maintained a defence that the amount of ₹12,000/- received by him was in fact the money collected by the complainant, and three other employees as fee for engaging a counsel for filing a case before the Central

Administrative Tribunal, and that one R.R Pillai who had some grudge against him used the complainant Dileep Kumar to arrange a trap against him. The accused examined four witnesses in defence. On an appreciation of the evidence adduced on both sides, the learned Special Judge found the appellant guilty under Sections 7 and 13(2) r/w 13(1)(d) of the P.C Act. On conviction thereunder he was sentenced to undergo rigorous imprisonment for two years, and to pay a fine of ₹25,000/-, under Section 7 of the P.C Act, and to undergo another term of rigorous imprisonment for two years under Section 13(2) r/w 13(1)(d) of the P.C Act by judgment dated 20.12.2002 in C.C. No.5/2001. Aggrieved by the conviction and sentence, the accused has come up in appeal.

3. In appeal, before this Court, the learned counsel for the appellant argued mainly on the legal ground that the appellant herein was not in fact a public servant as defined under the law, and that the conviction is legally unsustainable. Though the learned counsel argued on facts also the stress was mainly on the legal aspect.

4. Of the seven witnesses examined in the trial court, PW1 is the complainant Dileep Kumar, and PW2 is the

public servant arranged by the detecting officer to witness the trap. PW6 is the Inspector who registered the crime in this case on the complaint of PW1, and PW7 is the CBI Inspector who conducted investigation. The main evidence in this case is that of the complainant, the trap witness and the detecting officer. Before going to the legal aspect, as to whether the appellant herein was in fact a public servant, let me discuss the factual aspects. The short point for decision on facts is whether the appellant herein had demanded and accepted an amount of ₹12,000/- as illegal gratification from PW1.

5. The case on facts alleged against the appellant herein stands well proved by the evidence of the complainant, the trap witness, and the detecting officer. The evidence of the complainant is that he was a temporary employee on daily wages in the Unit Run Canteen attached to the Thiruvananthapuram Wing of Air Force, and that the accused herein was at that time a full time accountant in the Unit Run Canteen. His case is that on a promise that he would do the necessary things by using his influence, to make the complainant a permanent employee, the accused demanded ₹15,000/-, but he was not inclined to make such payment. When the accused made repeated demands and

reduced the claim to ₹12,000/- on bargain, he thought of making a complaint before the CBI. Accordingly, he went to the office of the CBI at Kochi and lodged Ext.P1 complaint. The amount of ₹ 12,000/- brought by him was seized by the CBI inspector as per mahazar, and necessary phenolphthalein test was demonstrated to him and the other witness. As instructed by the CBI Officer, he and the other trap witness went to the office of the accused, followed by the CBI officers. He and PW2 entered the office room of the accused for making payment. The trap witness was introduced by the accused as his relative. When he entered the office room, the accused asked the complainant to go to the canteen, and after sometime he was called to the office. When the accused demanded money, he made payment in the presence of PW2 at the office of the accused. Within no time, the CBI team reached there on getting signal, they seized the phenolphthalein tainted currency of ₹12,000/- from the possession of the accused, and the CBI officer arrested the accused on the spot. This is the evidence given by the PW1, the complainant.

6. The defence could not bring out anything in the cross examination of PW1 to discredit his evidence. PW1 is well

corroborated by PW2, the trap witness arranged by the CBI. The evidence of PW2 is well consistent regarding the trap arranged by the CBI Inspector, and also regarding the recovery of phenolphthalein tainted currency from the possession of the accused by the CBI officer. There is no reason why this witness should give false evidence against the accused. It is true that the complainant stated during evidence that PW2 was prevented at the entry gate by the security guard, but later he was allowed to go inside. On this aspect there is some inconsistency because PW2 does not say that he was prevented at the gate. Anyway, it doesn't matter whether PW2 was prevented by the security at the entry gate.

7. The detecting officer has also given definite evidence proving the recovery of tainted currency from the possession of the accused. He and the witnesses proved the mahazar as per which the tainted currency was seized from the possession of the accused, and all are well consistent regarding the recovery of tainted currency from the possession of the accused. The demand for ₹15,000/-, made by the accused is well proved by the evidence of the complainant and PW2. Of course it is true that there is no other evidence to prove the demand. In

cases like this, other evidence to prove demand may not be possible. But to prove the acceptance of money there is the clear evidence of the complainant, the trap witness, and the detecting officer. The amount of ₹12,000/- brought by the complainant was received by the CBI Officer for a trap, he applied phenolphthalein on all the currency notes, and the complainant was instructed to hand over the amount to the accused on demand. PW1 is definite that when the accused repeated his demand in the office also, even in the presence of PW2, he paid the amount, and the accused accepted the amount. PW2 is fully consistent on all these material aspects. I find nothing to disbelieve the evidence of PW1 on factual aspects. PW1 has no reason or ground to make a false complaint against the accused. The defence case stands not probabalised in any manner, that the complainant was in fact used by one R.R.Pillai to foist a false case, or that the amount of ₹12,000/- received by him was in fact the money arranged by way of fee for the advocate for filing a petition before the Central Administrative Tribunal. The complainant stoutly denied all the suggestions made in defence.

8. The detecting officer is also well consistent on all material aspects regarding the trap arranged by him on the

complaint of PW1, and the recovery of tainted money from the possession of the accused. All the witness identified the tainted money during trial. Thus I find on facts that the prosecution has well proved the case against the accused on facts, that the accused herein had accepted an amount of ₹12,000/- from the complainant on the promise that by using his influence and official position he would do the necessary things to make the complainant permanent in job. I find no reason to suspect or reject the evidence of the complainant, or that of PW2, or that of the detecting officer. Thus on facts, the prosecution case stands proved beyond reasonable doubt, and the conviction will have to be confirmed as right on facts, subject to the finding on the important question of law raised by the appellant, that the appellant was not in fact a public servant, and that the conviction is legally unsustainable.

9. The definite case of the complainant in his Ext.P1 complaint, and also in his evidence during trial is that the accused herein was a full time accountant in the Unit Run Canteen (URC) of the Thiruvananthapuram Wing of Air Force at the relevant time. It appears that proper enquiry was not made by the detecting officer or the investigating officer on this very

important aspect. PW4 is the Commanding Officer of the Southern Air Commanding Unit at Thiruvananthapuram. His evidence is that the accused herein was a civilian employee in the Air Force, and he had worked as part time accountant. On his retirement in 2000, he was appointed as a temporary employee on daily wages to assist the main accountant in the Unit Run Canteen. It is very clear from the evidence of PW4 that the accused herein was not in fact a part time or full time accountant in the Unit Run Canteen of the Air Force. In the final report submitted by the CBI in the trial court also it is stated that the accused was full time accountant in the Unit Run Canteen. There is reason to believe that without making any enquiry into these aspects as to whether the accused was in fact a permanent employee or a full time accountant or a part time accountant, the CBI officer who laid charge, mechanically submitted final report, and a temporary employee on daily wages happened to be prosecuted under the P.C Act. The definite case of the accused is that he was only a temporary employee on daily wages, and he was appointed after his retirement to assist the main accountant in the Unit Run Canteen. He does not claim to be a public servant, and he does not claim any benefit as a public

servant or as a regular employee attached to the Air Force Canteen. It is quite unfortunate that the CBI officer, who investigated the case did not make any investigation, or enquiry on this very important aspect.

10. PW4, the Air Force Commandant is definite in his evidence that the accused herein was not a permanent employee in the Unit Run Canteen. Of course he was a civilian in the Air Force, but he retired from the service in October 2000. The accused allegedly accepted illegal gratification in March 2001. The evidence of PW4 is that after retirement, the accused was appointed as a temporary part-time staff on daily wages to assist the main accountant. His evidence is not that the accused was appointed as assistant accountant. Practically, the thing is that the accused was in fact appointed as a temporary employee on daily wages, or as a personal assistant to the accountant in the Unit Run Canteen. In examination in chief itself, PW4 stated that there is no formal appointment order, appointing the accused as the assistant of the main accountant, and that the accused was paid only honorarium, and not salary. By way of honorarium he was given ₹1,300/- per month from the funds of the canteen, and when he was made full time, he was paid to

₹3,000/- per month as honorarium. As regards the source of the honorarium given to the accused, the evidence of PW4 is that honorarium paid to the temporary employees on daily wages is generated from the profits of the canteen. In cross examination PW4 stated that after retirement it was the canteen who paid the accused his honorarium, and it was not salary. He was not eligible for DA or any other allowance. The witness further stated that the Government of India is not spending any amount on the Unit Run Canteen, and that honorarium is paid to the temporary employees from the profits of the canteen, or from the funds of the canteen. The CBI, while registering the case, and also at the time of submitting the final report proceeded on a wrong premise that the accused was a full time accountant in the Unit Run Canteen of the Air Force. The real fact is otherwise, that the accused was not in fact a full time accountant in the Unit Run Canteen, and that after his retirement from regular service, he was appointed as a temporary employee on daily wages. Now let me decide whether such a temporary employee on daily wages can be called a public servant.

11. The learned counsel for the appellant cited a decision of the Hon'ble Supreme Court in **R.R. Pillai (Dead)**

through LRs v. Commanding Officer, Headquarters Southern Air Command (U) and others [(2009) 13 SCC 311] and also an unreported decision of this Court (DB) in O.P No.34353/2002S on the point. No doubt, every government servant will be a public servant, but every public servant as defined under the P.C Act need not a government servant. Even a person who is not a government servant can come within the definition of public servant under the P.C Act, if the necessary requirements are satisfied. In **R.R. Pillai's** (cited supra) case decided by the Hon'ble Supreme Court the question involved was regarding the status of the employees working in the Unit Run Canteen of the Army, Navy and Air Force. Of course it is true that the question was in fact not whether a temporary employee of the Unit Run Canteen is a public servant. The question decided therein is whether such an employee can claim the status of a government servant. But here, in this case, the question is not whether the accused was a government servant. The important question is whether he was a public servant as defined under the law. In **R.R Pillai's** (cited supra) case the Hon'ble Supreme Court overruled the earlier decision of the Hon'ble Supreme Court in **Union of India v. M.Asalam [(2001)**

1 SCC 720] and held that the Unit Run Canteens of the Army, Navy and Air Force are not funded from the consolidated fund of India and that such canteens are also not part of the Canteen Stores Department (CSD). The Hon'ble Supreme Court held that even temporary employees of the canteen, made permanent after probation and in due course, cannot claim to be government employees. The question involved in the unreported decision of this Court in O.P No.34353/2002 was concerning the status of a Manager of the Unit Run Canteen of the Air Force, appointed after his retirement. He claimed to be a government servant and sought a declaration to that effect. But this Court held that the employees of the Unit Run Canteen of the Air Force do not hold civil position and they do not have the status of government employees.

12. The learned Standing counsel for the CBI would submit that what is decided by this Court in the unreported case, and by the Hon'ble Supreme Court in **R.R.Pillai's** (cited supra) case is whether the temporary or permanent employees of the Unit Run Canteen (URC) of Air Force are government servants, and not whether such employees are public servants. The learned Standing Counsel also submitted that the question

whether the appellant herein is in fact a public servant, will have to be answered independently, and that those decisions cannot have bearing on the issue involved in this case. Of course it is true that the material question herein is whether the appellant herein was a public servant, and not whether he was a government employee. However, the finding of the Hon'ble Supreme Court regarding the Unit Run Canteens, and their funds and sources, is relevant in this case.

13. Section 2(c) of the P.C Act 1998 defines public servant. The learned standing counsel for the CBI submitted that the appellant herein would come under Clause (xii) of Section 2(c), which says that any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government, or local or other public authority is a public servant. The learned standing counsel submitted that any institution including a Unit Run Canteen of the Air Force will come under Clause (xii). I find that this argument is not acceptable. Only office-bearers and employees of institutions like educational, scientific, social or cultural

institutions are governed by Clause (xii). The term “or other institution” in Clause (xii) must be interpreted ejusdem generis. Clause (xii) indicates the nature and function of the different institutions meant under Clause (xii). Such institutions must be the institutions functioning for educational, scientific, social or cultural, or the like purposes. A canteen, which is practically a restaurant where entry is limited to a particular class cannot come within the definition of educational or scientific or social or cultural or the like institutions. Even if, it could be assumed for a moment that even a Unit Run Canteen of the Air Force will come under Clause (xii), the very important question is whether the Unit Run Canteen is an institution receiving any financial assistance from the Central Government or the State Government. It is here the findings of the Hon'ble Supreme court in **R.R Pillai's** (cited supra) case assumes importance.

14. Even otherwise, a decision is possible on the basis of the definite evidence given by PW4. His evidence in examination-in-chief itself is that the accused, as a temporary employee on daily wages, was given only honorarium generated from the profits of the canteen, and that such employees are not paid anything from government funds or public funds. Just

because commodities are supplied on concessional rates to canteens by the government or the Civil Supplies Department in the interest of certain categories of employees or servants, the workers and servants in such canteens cannot be said to be public servants under the law. Such concession granted by the Government or Civil Supplies Department cannot be said to be financial assistance as meant under Clause (xii). Admittedly, the Unit Run Canteen of the Air Force where the accused was employed is not part of the Air Force. The canteen will have its own profits from business. The evidence of PW4 is that honorarium to the temporary employees will be paid from this profits derived by the canteen. He is definite that such honorarium is not paid from public funds or from any amount of grant or assistance received from the government. If the prosecution has such a case that the Unit Run Canteen of the Air Force wherein the accused was employed, is an institution getting financial assistance from the Central Government or the State Government, the prosecution should have specifically brought it out in the evidence of PW4. But what PW4 stated in his evidence is otherwise, that nothing is being paid for the running or management of the Unit Run Canteen from the public

funds or the consolidated funds of India, and that every employee in the canteen will be paid salary or honorarium from the profits of the canteen. Thus his evidence is very clear that the Unit Run Canteen is not an institution or a body receiving any assistance from the government. In fact much probe or enquiry on this aspect is not required in view of the findings of the Hon'ble Supreme Court on this aspect. When PW4 also has no such case, that the Unit Run Canteen is a body receiving any funds or grant or assistance from the Central Government or the State Government, the only finding possible in this case is that the appellant herein was not in fact a public servant on the date of detection.

15. A conviction under Section 7 or 13(2) of the P.C Act is possible, on the allegation of acceptance of illegal gratification, only if the accused is a public servant. I find that the appellant does not come within the definition of public servant under Sections 2(c)(xii) of the P. C Act. The Unit Run Canteen of the Air Force wherein he was employed is not a part of the Canteen Stores Department as held by the Supreme Court in **R.R Pillai's** (cited supra) case, and it is not an institution getting any financial assistance or grant or other benefits from

the Central Government or State Government. The Government of India has nothing to do with the running or management of such canteens. Nothing is paid to such canteens from the consolidated fund of India or other funds by way of grant or assistance, and such canteens will have to make their own resources by way of profit for payment to the employees.

16. In view of the findings on the question of law that the appellant herein is not a public servant coming under the definition of public servants under Sections 2(c) (xii) of the P.C Act, the conviction against him under the provisions of the P.C Act is liable to be set aside. The allegation against him is that he accepted illegal gratification from the complainant under a promise that he would make him permanent in job. It is not known how a temporary employee on daily wages could make such a promise, or how another temporary employee who knows very well about the status of the accused, could simply believe such a promise.

In the result, this appeal is allowed. The appellant herein is not found guilty of the offence under Sections 7 and 13 (2) of the P.C Act, 1988, and accordingly, he is acquitted of the said offence in appeal under Section 386(b)(i) Cr.P.C. The

conviction and sentence against the appellant in C.C No.5/2001 of the court below will stand set aside, and the appellant will stand released from prosecution. The bail bond, if any, executed by the appellant will stand discharged.

**P.UBAID
JUDGE**

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