IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.UBAID

WEDNESDAY, THE 2ND DAY OF DECEMBER 2015/11TH AGRAHAYANA, 1937

CRL.A.No. 173 of 2007 ( )

AGAINST THE JUDGMENT IN CC 18/2003 of ENQUIRY COMMR.& SPL.JUDGE,THRISSUR DATED 22-01-2007

APPELLANT(S)/ACCUSED:

K.GANGADHARAN NAIR,
FORMER EXECUTIVE OFFICER
PARATHODE GRAMA PANCHAYATH.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENT(S)/COMPLAINANT & STATE:

1. DEPUTY SUPERINTENDENT OF POLICE,
V A C B, KOTTAYAM.

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

BY PUBLIC PROSECUTOR SMT.SHEEBA M.T.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27.10.2015, THE COURT ON 02-12-2015, DELIVERED THE FOLLOWING:

P.UBAID, J.
~~~~~~~~~~~~
Crl.A No.173 of 2007
~~~~~~~~~~~~~
Dated this the 2nd December, 2015

J U D G M E N T

The appellant herein was the Special Grade Executive Officer of the Parathode Grama Panchayat in October-November 1993. On the allegation that he dishonesty misappropriated an amount of ₹ 50,000/-, withdrawn by him from the V.P.F Account of the Panchayat in advance for different public purpose activities, without accounting it in the panchayat records including cash register, the appellant faced prosecution before the learned Enquiry Commissioner and Special Judge (Vigilance) Thrissur in C.C 18 of 2003. The Deputy Superintendent of Police, Vigilance and Anti-Corruption Bureau (VACB), Kochi conducted a fact finding enquyiry on the basis of information or complaint regarding such dishonest misappropriation, and on the basis of the said report of enquiry, the VACB registered F.I.R against the appellant. After investigation, the VACB submitted final report before the court below.

2. The appellant entered appearance before the

trial court and pleaded not guilty to the charge framed against him under Section 13 (2) read with Section 13 (1) (c) & 13 (1) (d) of the Prevention of Corruption Act, (for short “the P.C Act”) and also under Section 409 of Indian Penal Code. The prosecution examined eight witnesses in the trial court and marked Exts.P1 to P22 documents. Ext.X1 audit report for the period 1993-1994 was also marked at the instance of the prosecution. When examined under Section 313 Cr.P.C, the accused denied the incriminating circumstances and projected a defence that the amount of 50,000/- was encashed by the Head Clerk (PW7), the same was not handed over to the Executive Officer promptly, and the amount was in fact misappropriated by the Head Clerk Raveendran Nair. No oral evidence was adduced in defence by the accused, though opportunity was granted by the trial court. However, Ext.D1 document was marked on the side of the defence. On an appreciation of the evidence, the trial court found the accused guilty. On conviction, he was sentenced to undergo rigorous imprisonment for four years each and to pay a fine of ₹ 50,000/- each under Section 13

(2) read with 13 (1) (c) of the P.C Act, under Section 13 (2) read with 13 (1) (d) of the P.C Act and under Section 409 I.P.C. Aggrieved by the said judgment of conviction, the accused has come up in appeal.

3. When this appeal came up for hearing, the learned counsel for the appellant submitted that the appellant is entitled for acquittal on factual as well as legal grounds, and that the whole prosecution is tainted with genuine suspicion regarding the role of PW7. On the other hand, the learned Public Prosecutor submitted that the prosecution sanction in this case stands properly proved by the Government Secretary, that the dishonest misappropriation by the accused also stands proved, and there is nothing to suspect PW7 or any other person regarding the alleged misappropriation. On an appreciation of the entire evidence and on hearing both sides, I find that there is something to suspect regarding PW7 in the matter of the alleged dishonest misappropriation. It has come out in evidence that the cheque for ₹ 50,000/- was really encashed by PW7, and the amount was received by him

from the Treasury. The prosecution case is that the said amount was promptly handed over to the accused by PW7, and the accused dishonestly misappropriated for his purposes without making necessary entries in the Panchayat registers including cash book.

4. Before going to the factual aspect regarding the alleged misappropriation, let me examine whether the prosecution sanction in this case stands proved properly accordingly to law. Ext.P1 is the prosecution sanction granted by the Principal Secretary to the Government under Section 19 of the P.C Act. PW1 was examined by the prosecution to mark the prosecution sanction. It cannot be said that the prosecution sanction is proved by PW1. This Court has recently settled the position as regards proof of prosecution sanction, that it must be properly proved by the person who granted the sanction, except in cases where the sanction can claim some sanctity or privilege under the law. In this Case, Ext.P1 is not something, that can claim such sanctity or privilege. The sanction was granted by the Principal Secretary to the Government. An identical situation

came up before this Court in **Antony Cardoza v. State of Kerala (2011 (1) KLT 946),** where the prosecution examined an Under Secretary to the Government to prove the prosecution sanction granted by the Principal Secretary. In the said case, a learned Single Judge of this Court held that independent application of mind in the process, and consequent satisfaction arrived at for granting sanction under Section 19 of the P.C Act are matters which could be proved only by the sanctioning authority. This Court held that when prosecution sanction including independent application of mind is not proved by the person who granted the sanction, it cannot be said that the prosecution sanction is properly and legally proved. In so many decisions, the Hon'ble Supreme Court has held that the prosecution must prove in such circumstances that the sanction under Section 19 of the P.C Act was granted by the competent authority on a consideration of all the relevant aspects and materials, and on an independent application of mind. That the necessary materials and documents were perused or considered, and that mind was independently applied to the facts and situations, will have to be proved by the person who granted the sanction. That function cannot be taken over by somebody else. This is what this Court held in **Antony Cardoza.** Recently also this Court has settled the position, following **Antony Cardoza** that the prosecution sanction granted under Section 19 of the P.C Act will have to be proved by the person who granted the sanction, and that formal proof by somebody who can identify the signature of the sanctioning authority can be accepted only in cases where the sanction can claim some sanctity or privilege under the law. In this case, the prosecution has no explanation for not examining the person who granted the sanction. PW1 is not at all competent to prove the essentials of the sanction, including independent application of mind. I find that the prosecution sanction in this case stands not properly and legally proved , and so it will have to be found that the prosecution in this case is barred under Section 19 of the P.C Act.

5. Now let me come to the factual aspects. The prosecution case is that the accused withdrew an amount of

₹ 50,000/- from the V.P.F Account of the Parathode Grama Panchayat as an advance for different public purpose activities, and without accounting the same in the registers, or without making necessary entries in the cash book and other registers, the accused dishonestly misappropriated the said amount. Now let me see whether there is corresponding entry in the cash book. Ext.P14 is the true extract of the entries in the cash book, relating to the day on which the amount was withdrawn from the Treasury. PW7 was the Head Clerk of the Panchayat at the relevant time. His evidence is that the amount was encashed by him as authorised by the Secretary, and the amount was promptly handed over by him to the Secretary, without any delay. To claim so, PW7 relies on Ext.P6 receipt alleged to have been issued by the accused. The definite defence contention is that Ext.P6 is a forged document. This document marked through PW7 does not bear any date. This receipt is meant to prove payment of different amounts by PW7 to the Secretary on different occasions. This shows payment of ₹ 50,000/- on 15.5.1993, payment of ₹25,000/- on 10.6.1993, payment of another amount of ₹ 50,000/- on 30.7.1993, payment of another amount of ₹ 50,000/- on 10.11.1993 and payment of ₹ 25,000/- on 4.4.1994. There is no doubt that in view of the last entry regarding payment on 4.4.1994, Ext.P6 receipt must have been issued on or after 4.4.1994. The alleged misappropriation was in November, 1993. The amount was allegedly withdrawn from the treasury on 10.11.1993, and relying on Ext.P6 document PW7 says that on 10.11.1993 itself the amount was handed over by him to the Secretary. Ext.P6 shows such an entry regarding payment of ₹ 50,000/- to the Secretary on 10.11.1993. It is curious to note that Ext.P6 does not bear any date. True it is, that it bears the seal of the Panchayat and also the signature of the Secretary. The contention of the accused assumes importance that a signed paper was obtained by him by PW7 under some pretext and he made use of it to create a receipt. There is no explanation why or how such a receipt was necessitated after 4.4.1994, when the alleged misappropriation was in November 1993. Had the amount been promptly handed over by the Head Clerk to the

Secretary, he would have obtained receipt on 10.11.1993 itself. There is also no explanation why different payments from 15.5.1993 to 4.4.1994 are seen entered in the Ext.P6 receipt. It is common practice that when an amount is withdrawn from the treasury by a person other than the withdrawing officer, the person who withdrew it on authorisation, will, on the same day, hand it over to the withdrawing officer. Here there is a strange situation evidenced by Ext.P6 receipt. PW7 or the prosecution, does not have any satisfactory explanation for this Ext.P6 receipt which was 'born' after 4.4.1994, when the alleged misappropriation was in November, 1993. I find that there is something suspicious regarding Ext.P6 receipt on which PW7 relies to claim that the amount received by him from the treasury on 10.11.1993 was handed over by him to the Secretary on the same day.

6. Now let me come to the cash book, which is a very important document, to prove all the cash transactions in the panchayat office. Withdrawal of ₹ 50,000/- is seen entered in Ext.P14 cash book. On a close examination of the

entry, I find that there is something suspicious regarding this entry. There is reason to believe that this entry was subsequently made as an inter-lineation entry. We can suspect the accused if such an entry was in fact made by the accused. But here, PW7 has admitted that this cash book entry regarding ₹ 50,000/- withdrawn on 10.11.1993 was in fact made by him. It is curious to note that this admission regarding the entry made by PW7 was brought out by the learned Public Prosecutor in re-examination. Thus, it is quite clear that the entry in the cash book regarding the disputed amount of ₹ 50,000/- was not made by the accused. In fact, the said suspicious entry showing withdrawal of ₹ 50,000/- and receipt by the Secretary, was in fact made by PW7 on a subsequent date. It has come out in evidence, as admitted by PW7 himself, that he was convicted in two other cases on the allegation of dishonest misappropriation of amount from public funds. There is nothing to show that he stands acquitted by the appellate court. Thus, it is a fact that PW7 is a previous convict. He is admittedly a person who received conviction in two cases previously on the allegation of dishonest misappropriation of public funds. It is here, the disputed or suspected entry in Ext.P14 cash book regarding the disputed amount of ₹ 50,000/- assumes importance.

7. PW7 has no case in evidence that the suspicious entry (suspected by the court) in Ext.P14 regarding the disputed amount of ₹ 50,000/- was made by him as instructed or directed by the Secretary. He has no case that he was compelled or threated or otherwise directed by the Secretary to make such an entry. His evidence shows that he voluntarily made such an entry showing receipt of ₹ 50,000/- in the panchayat office, withdrawn from the treasury. The fact that this suspicious entry was made by PW7 himself after sometime, gives an indication that the amount was not in fact misappropriated by the Secretary. PW7 or any other witness has no case that this entry was subsequently made by the accused himself to make it appear that he had not misappropriated the amount. Admittedly, PW7 made the entry, and there is reason to believe that it was made by him after some days. He has no

explanation why he made such an entry after a few days. He has no case that he was compelled or instructed or directed by the Secretary to make such an entry. This proves very well that the alleged misappropriation was not in fact made by the Secretary. Had it been made by him, he would have made the suspected entry in Ext.P14. Thus, I find that the whole prosecution case as against the accused is really very suspicious.

8. There is yet another important aspect in this case. It is well settled that some information revealing a cognizable offence is absolutely necessary for the registration of F.I.R under Section 154 Cr.P.C. In this case, it is not known who made complaint against the appellant. It is not known what exactly is the basis of the F.I.R in this case. It was submitted by the learned Public Prosecutor that the crime was registered on the basis of a report of enquiry. But such a report of enquiry is not seen produced in court, and such report is not proved also. First Information Report under Section 154 Cr.P.C can be registered only on the basis of some definite material containing some information

regarding the commission of a cognizable offence. Thus, a crime is always registered on the basis of some definite material or information revealing the commission of a cognizable offence. Here, the F.I.R was made without any basis. The F.I.R in this case does not show any source like complaint or information. On this very ground itself, the whole prosecution must collapse. The prosecution does not explain who made complaint in this case, or how, or on what basis the crime happened to be registered. In short, the prosecution does not say what exactly is the basis of the F.I.R in this case. If it is a complaint,it is not seen produced in court. If it is a report of enquiry, the enquiry report is not seen produced in court.

9. As discussed in the foregoing paragraphs, I find that the appellant in this case is entitled for acquittal on factual as well as legal grounds. The legal aspects are that the F.I.R is baseless, and that the whole prosecution is barred under Section 19 of the P.C Act. On factual aspects, I find that the allegation of misappropriation against the accused is really suspicious. The benefit of this strong

suspicion must go to the accused. I find that the conviction in this case against the appellant is liable to be set aside.

In the result, this appeal is allowed. The appellant is found not guilty of the offences under Section 13 (2) read with 13 (1) (c) and 13 (1) (d) of the P.C Act and under Section 409, I.P.C. Accordingly, the appellant is acquitted of the offences in appeal under Section 386 (b) (i) of Cr.P.C. The conviction and sentence against the appellant in C.C 18 of 2003 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.

Sd/-
P.UBAID
JUDGE

ma

/True copy/
P.S to Judge