

The Appellant herein namely M.V.Sethumadavan Accused in CC.No.144/97 on the file of the Additional Special Judge for CBI Cases, was released on bail by order of this Court dated 03.02.2006 and made in CRL.Mp.No.781/06 in Crl.A.No.111/06.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.11.2015

DELIVERED ON : 11.12.2015

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM

Criminal Appeal No.111 of 2006

M.V.Sethumadavan ... Appellant/ Appellant /Accused-1

vs.

State rep. by
Inspector of Police,
SPE:CBI:ACB
Chennai

... Respondents/Complainant

Criminal Appeal filed under Section 374(2) of Cr.P.C., against the judgment passed in C.C.No.144 of 1997 dated 29.12.2005 on the file of the Additional Special Judge for CBI Cases, Chennai.

For appellant : Mr.A.Ramesh, Sr.Counsel for
Ms.Gita Asokan

For Respondent : Mr.K.Srinivasan,
Spl. Public Prosecutor.

JUDGMENT

The conviction and sentence dated 29.12.2005 passed in Calendar Case No.144 of 1997 by the Additional Special Judge for CBI Cases, Chennai are being challenged in the present Criminal Appeal.

2. The case of the prosecution is that during July and December 1989, the accused 1 and 2 have entered into a criminal conspiracy in Avadi, Chennai and also other places and thereby agreed to do or caused to do an illegal act, viz., cheating

Vijaya Bank, Avadi Branch and to commit criminal misconduct. In pursuance of their criminal conspiracy, the first accused as Branch Manager has misused his official position, fraudulently and dishonestly discounted 12 bills bearing Nos.BD 15/89 to 26/89 for a total sum of Rs.53.76 Lakhs, drawn in favour of M/s.Nimas International, Bombay, exceeding his discretionary power. In fact, the bills have not been accompanied with lorry receipts and therefore, there are no supporting documents to show that the bills in question are related to genuine transaction. The first accused, after knowing fully well that the bills have been presented only to wipe out outstanding liability of the BD in the name of M/s.All India Paper Convertors owned by the second accused and the said bills have not been honoured by M/s.Nimas International, Bombay and in furtherance of criminal conspiracy, on 26.7.1989, has purchased a bill for a sum of Rs.15,07,500/- drawn on M/s.T.G.L.Group Marketing Services, Guntur, registered as DBP 1/89 and the said amount has been credited into Current Account 316 by M/s.Super Sales Corporation owned by the 2nd accused. Further, the first accused in order to give aidance to the 2nd accused, has written a letter to release documents including documents in respect of DBP 1/89 at free of cost. The first accused has closed DBP by way of transferring it to the BD A/c. No.2/89 on 15.12.1989. On 29.9.1989, the first accused has purchased DBP 3/89 to 8/89 from the 2nd accused drawn by M/s. Nimas International, Bombay, when DBP 1/89 is outstanding from the 2nd accused and these bills have not been supported by lorry receipts or delivery challans or any other documents to establish the genuine transactions. The total bills of Rs.26.8 Lakhs have been credited to current A/c.316 of M/s.Super Sales Corporation. The first accused for the purpose of assisting the second accused has not forwarded the said bills for collection. Further, on 15.12.1989, the first accused has received DBP account by debiting BD account for the purpose of cheating Vijaya Bank. From 12.9.1989 to 10.11.1989, in pursuance of criminal conspiracy, the first accused purchased 11 clean bills from the 2nd accused by way of exceeding discretionary power of Rs.10,000/-. The first accused has concealed the facilities given to the second accused. The first accused has misused his power and the second accused in the course of transactions by way of releasing bogus bills has cheated the said Bank. The first accused, being a public servant, in the course of transactions, has indulged in corrupt practice.

3. On the basis of the allegations made against both accused, the respondent has launched investigation and after completing the same, laid a final report on the file of the trial court.

4. The trial court, after hearing arguments of both sides and also after considering the relevant documents, has framed charges against the first accused under section 120-B r/w 420 of IPC and also under section 13(2) r/w 13(1)(d) of Prevention of Corruption Act. As against the second accused, the trial court has framed charges under section 120-B r/w 420 of IPC and also under section 13(2) r/w 13(1)(d) of the said Act and the same have been read over and explained to them. The accused have denied the charges and claimed to be tried.

5. On the side of the prosecution, P.Ws.1 to 7 have been examined and Exhibits P.1 to P.89 have been marked.

6. When the accused have been questioned under Section 313 of the Criminal Procedure Code, as respects the incriminating materials available in evidence against them, they denied their complicity in the crime.

7. On the side of the accused, D.Ws.1 and 2 have been examined and Ex.D.1 to D.3 have been marked.

8. The trial court, after hearing arguments of both sides and upon perusing relevant evidence available on record, has found the first accused guilty under Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988 and thereby imposed rigorous imprisonment of 2 years with a fine of Rs.5,000/-. The trial court has acquitted the first accused and the second accused in respect of remaining charges. Against the conviction and sentence passed by the trial court, the present Criminal Appeal has been filed at the instance of the first accused as appellant.

9. The learned senior counsel appearing for the appellant/first accused has sparingly contended that during the relevant period, the first accused has served as Manager, Vijaya Bank and by using his discretionary power, he purchased some bills and in anticipation of subsequent ratification, he purchased some more bills from the 2nd accused. The first accused has not acted with mala fide intention nor benefited by the transactions in question and further before registering the First Information Report, the second accused has discharged his entire liability with interest and no loss has credited to the concerned bank and in fact, the trial court after making elaborate discussion, has rightly acquitted both accused in respect of remaining charges, except the first accused under section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988 and since the first accused has acted with bona fide intention and that too in anticipation of getting approval from higher authority, he cannot be found guilty under the said sections and

the trial court, without considering the circumstances under which the case has been registered and also the fact that the second accused has already paid the entire amount with interest, has erroneously found the first accused guilty under section 13 (2) r/w 13(1)(d) of Prevention of Corruption Act, 1988 and therefore, the conviction and sentence passed by the trial court are liable to be interfered with.

10. The learned Special Public Prosecutor appearing for the respondent has contended that in the instant case, the first accused has exceeded his limit for the purpose of giving benefits to the second accused, even though the first accused has not personally benefited and since he facilitated the second accused to get benefit, the first accused is liable to be punished under section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988 and the trial court has rightly fixed liability upon the first accused and therefore, the conviction and sentence passed by the trial court do not require interference.

11. The consistent case put forth on the side of the prosecution is that during relevant period, the first accused has served as Branch Manager, Vijaya Bank, Avadi and by way of exceeding his discretionary power, he purchased various bills so as to assist the second accused. It is an admitted fact that before registering FIR, the second accused has discharged his entire liability with interest and even the said aspect has been clearly mentioned by the trial court in its judgment.

12. The only aspect that has now winched to fore is as to whether the first accused has acted with sinister motive and thereby given aidance to the second accused??

13. The learned senior counsel appearing for the appellant/first accused has referred the following documents:

(i) The Management Services Department Rules, wherein it is observed as follows:

"While acting upon oral or written orders of higher authorities, the lower authority will be entitled to presume that such higher authority has the requisite powers of has obtained the necessary authority, from his superiors and he should immediately report to his controlling authority seeking confirmation of the orders of the higher authority which has issued the oral instructions. The higher authority should also ensure confirmation of such oral instructions within a period of 7 days.""

From a mere reading of the said Rule, the Court can easily come to a conclusion that Branch Manager is having discretionary power.

14. In the investigation conducted in respect of irregularities, it is observed as follows:

"It was suggested to the AGM that it is evident that giving oral permission by him directly to the BM was prevalent and it is also true that such oral permission were not confirmed in writing as required by rules for which the executive has said that he agrees that within the stipulated time oral permission accorded to the BM was not confirmed. This may be due to oversight. The practice of giving oral permission to the BM on specifications only is prevalent."

15. From a close reading of the observations referred to supra, it is made clear that seeking oral permission from AGM and subsequent approval are very much prevalent in Vijaya Bank. Further, it is seen from the report that failure to give approval is nothing but an oversight.

16. As adverted to earlier, the specific case of the prosecution is that the first accused while discharging his duties as Branch Manager, has acted with dishonest intention for the purpose of assisting the second accused.

17. It has already been pointed out that the first accused as Branch Manager during the relevant period has had discretionary power to certain extent. The specific defence put forth on the side of the first accused is that for exceeding discretionary power, oral permission has been sought from AGM. Further, it has already been decided that seeking oral permission and subsequent approval are very much prevalent.

18. The only point as culled out earlier is as to whether the first accused has acted with mala fide intention to give benefits to the second accused.

19. The learned senior counsel during the course of his argument has befittingly drawn the attention to the court to the decision reported in 2009 (6) SC cases, 587 (A.SUBAR Vs. STATE OF KERALA) wherein, the Hon'ble Supreme Court has dealt with a case of similar nature and ultimately given a finding to the effect that the position will, however, be different so far as an offence under section 5(1)(d) read with Section 5(2) of the

Act is concerned. For such an offence prosecution has to prove that the accused 'obtained' the valuable thing or pecuniary advantage by corrupt or illegal means or by otherwise abusing his position as a public servant and that too without the aid of the statutory presumption under section 4(1) of the Act as it is available only in respect of offences under Sections 5(1)(a) and (b) - and not under sections 5(1)(c), (d) or (e) of the Act. 'Obtain means to secure or gain (something) as the result of request or effort (Shorter Oxford Dictionary). In case of obtainment the initiative vests in the person who receives and in that context a demand or request from him will be a primary requisite for an offence under Section 5(1)(d) of the Act unlike an offence under section 161 IPC, which as noticed above, can be established by proof of either 'acceptance' or 'obtainment'. The legal position is no more res integra that primary requisite of an offence under section 13(1)(d) of the Act is proof of a demand or request of a valuable thing or pecuniary advantage from the public servant. In other words, in the absence of proof of demand or request from the public servant for a valuable thing or pecuniary advantage, the offence under section 13(1)(d) cannot be held to be established.

20. From a close reading of the decision referred to supra, in the absence of proof of demand or request from public servant for a valuable thing or pecuniary advantage, the offence under the said sections mentioned supra, cannot be held to be established.

21. In the instant case, even at the risk of repetition, the Court would like to point out that seeking oral permission from AGM and subsequent approval of the act of the Branch Manager are prevalent. The specific defence taken on the side of the appellant/first accused is that oral permission has been sought from AGM. Even in the enquiry report, it has been specifically stated that only due to oversight on the part of the AGM, oral permission has not been granted. Therefore, the Court cannot come to a conclusion that only with an intention to assist the second accused, the first accused has purchased the bills in question. Further, as pointed out earlier, the second accused has discharged his entire liability with interest before registering First Information Report. Under the said circumstances, the first accused cannot be mulcted with liability.

22. It is seen from the records that already the first accused has been suspended from service. Even if there is any lapse or omission on the part of the first accused, on the basis of available factual aspects, he cannot be held criminally liable.

23. The trial court, without considering the admitted factual aspects and also without any evidence for the purpose of showing that only for the purpose of giving assistance to the second accused, the first accused has purchased bills, has erroneously come to a conclusion that the first accused has committed an offence punishable under section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988. In view of foregoing enunciation of both factual and legal aspects, this Court has found considerable force in the contentions put forth on the side of the appellant/first accused and therefore, the present Criminal Appeal is liable to be allowed.

In fine, this Criminal Appeal is allowed. The conviction and sentence passed in Calendar Case No.144 of 1997 by the Additional Special Judge for CBI Cases, Chennai are set aside. The appellant/first accused is acquitted. Bail bond, if any executed by him, shall stand cancelled. Fine amount, if any paid by him, is ordered to be refunded forthwith.

Sd/
ASSISTANT REGISTRAR(CO)

/TRUE COPY/

SUB-ASSISTANT REGISTRAR

ajr

To :

1. Additional Special Judge for CBI Cases, Chennai.
2. Inspector of Police, SPE:CBI:ACB, Chennai
3. The Public Prosecutor, High Court, Chennai
4. The Superintendent, Central Prison, Chennai.
5. The District Collector, Chennai.
6. The Director General of Police, Chennai.

+3 CC to Ms.Gita Asokan Advocate. SR.NO. 66900
+1 CC to MR.K.Srinivasan Advocate. SR.NO. 66691

CrI.A.No.111 of 2006

CO-ALA
JD 23/12/2015