

BAIL SLIP

That the Appellant herein/Accused viz. G.Sivabalan was directed to be released on bail as per the order of this court dated 17.9.2009 and made in Crl.M.P.N.1 of 2009 in Crl.A.No.554 of 2009.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.02.2016

CORAM

THE HONOURABLE MR. JUSTICE A.SELVAM

Crl.A.No.554 of 2009

G.Sivabalan

.. Appellant/Accused

Vs.

State rep.by
The Inspector of Police,
CBI/ACB/Chennai.

.. Respondent/Complainant

Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 against the convictions and sentences dated 26.08.2009 passed in C.C.No.6 of 2005 by the Special Court for CBI cases/IX Additional Sessions Judge, Chennai.

For Appellant : Mr.A.Ramesh, Senior Counsel
for M/s.A.Edwin Prabakar

For Respondent : Mr.K.Srinivasan
Special Public Prosecutor for CBI cases

JUDGMENT

This Criminal Appeal has been directed against the convictions and sentences dated 26th August, 2009 passed in Calendar Case No.6 of 2005 by the Special Court for CBI Cases/IX Additional Sessions Judge, Chennai.

2.The contraction of the case of the prosecution is that during the relevant period, the accused viz., G.Sivabalan has served as Superintendent of Central Excise, Service Tax Cell, Chennai, Commissionerate. The defacto complainant viz., Vasudevan and his wife Smt.Seethalakshmi are the Directors of the company known as M/s.Jayadasa Engineering and Exports Pvt. Ltd. The said company has calculated/self assessed

service tax and paid Rs.24,445/- for the period from October 2003 to March 2004. One Gunasekaran, an employee of the said company has met the accused in his office. The accused has directed him to produce all bills and receipts relating to service tax paid within two or three days from 11.05.2004. The said company has prepared details and personally handed over the same to the accused. The accused has insisted the defacto complainant to meet him personally. On 13.08.2004, the accused has contacted the defacto complainant over phone and thereby directed to meet him in his office and accordingly, the defacto complainant has met the accused on the same day. The accused has informed him that the service tax paid by the defacto complainant is erroneous. On 19.08.2004, the accused has again contacted the defacto complainant over phone and demanded a sum of Rs.25,000/- by way of bribe to clear service tax assessment. On 23.08.2004, the defacto complainant has preferred a complaint and in pursuance of the same, the Investigating Officer has made an arrangement to conduct trap and accordingly, on the same day the defacto complainant and decoy witness have met the accused in his office and handed over a white cover which contained tainted money to him and subsequently the accused has been caught red-handed and thereafter, all necessary tests have been conducted in the presence of the accused and tainted money and other Material Objects have been recovered. The Investigating Officer has examined connected witnesses and after completing investigation has laid a final report on the file of the trial Court and the same has been taken on file in Calendar Case No.6 of 2005.

3.The trial Court after hearing both sides and upon perusing relevant records has framed a charge against the accused under Sections 7 and 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988 and the same has been read over and explained to him. The accused has denied the charge and claimed to be tried.

4.On the side of the prosecution PWs.1 to 8 have been examined and Exs.P1 to P11 and M.Os.1 to 6 have been marked.

5.When the accused has been questioned under Section 313 of the Code of Criminal Procedure, 1973 as respects the incriminating materials available in evidence against him, he denied his complicity in the crime. On the side of the accused, Exs.D1 to D6 have been marked.

6.The trial Court after hearing arguments of both sides and also after perpending the available evidence on record has found the accused guilty under Section 7 of the Prevention of Corruption Act, 1988 and sentenced him to undergo three years rigorous imprisonment and also imposed a fine of Rs.1,00,000/- with usual default clause. Further he has been found guilty under Sections 13(2) r/w 13(1)(d) of the said Act and sentenced to undergo three years rigorous

imprisonment and also imposed a fine of Rs.1,00,000/- with usual default clause. Against the convictions and sentences passed by the trial Court, the present Criminal Appeal has been preferred at the instance of the accused as appellant.

7.The sum and substance of the case of the prosecution is that during the relevant period, the accused has served as Superintendent of Central Excise, Service Tax Cell, Chennai, Commissionerate. The defacto complainant viz., Vasudevan and his wife are the Directors of the company viz., M/s.Jayadasa Engineering and Exports Pvt. Ltd., and the said company has used to pay service tax and accordingly for the period started from October 2003 to March 2004, it has paid a sum of Rs.24,445/- as service tax. One Gunasekaran, an employee of the said company has met the accused in his office for filing service tax returns on 11.05.2004. The accused has insisted the defacto complainant to meet him personally. On 13.08.2004 the accused has contacted the defacto complainant over phone and informed that the service tax paid by the said company is erroneous. On 19.08.2004 the accused has again contacted the defacto complainant over phone and demanded a sum of Rs.25,000/- by way of bribe so as to clear the service tax and since the defacto complainant is not interested to give bribe, a complaint has been lodged to the Investigating Officer and subsequently pre-trap proceedings have been conducted and thereafter, the defacto complainant and a decoy witness have met the accused in his office. The accused has demanded bribe from the defacto complainant and after his demand, a white cover which contained tainted money has been handed over to him and after receipt of the same, the accused has kept it in his right pant pocket and thereafter after receipt of pre-arranged signal, the Inspector by name Moni has enquired the accused and also conducted search and the accused has taken out the said cover from right pocket of his pant and thereafter, necessary tests have been conducted.

8.The Commissioner of Central Excise who accorded permission to prosecute the accused has been examined as PW1 and he filed Ex.P2, sanction order. The defacto complainant has been examined as PW2 and the complaint given by him has been marked as Ex.P3. The decoy witness by name Ramasubramaniam has been examined as PW3. The Inspector, trap laying officer has been examined as PW4. The Scientific Officer has been examined as PW6. The Investigating Officer has been examined as PW8. The trial Court after considering their evidence coupled with connected documents, has found the accused guilty under the sections mentioned in the charge and sentenced him to undergo imprisonment as mentioned in the Judgment.

9.The learned Senior Counsel appearing for the appellant/accused has attacked the convictions and sentences passed by the trial Court on two grounds namely;

(a) The consistent case of the prosecution is that during the course of pre-trap proceedings, the defacto complainant has handed over tainted money of Rs.25,000/- to trap laying officer and after conducting necessary tests, the same has been put into a white cover and the said cover has also been subjected to requisite test and the specific evidence given by the defacto complainant, decoy witness and trap laying officer is that the said cover has been utilised for keeping tainted money and the said cover has been handed over to the accused. But the prosecution has failed to mark the same, nor the same has been subjected to Sodium Carbonate and phenolphthalein test. Under the said circumstances, the alleged demand of bribe as well as acceptance of the same by the accused have not been proved on the side of the prosecution and the trial Court has failed to look into the same.

(b) The specific evidence given by all vital witnesses is that in the instant case to record conversation between the defacto complainant and accused, micro chip has been utilised and the same has been marked as M.O.2. But M.O.2 has not been displayed by the trial Court. On that score also, the prosecution has failed to establish the charge framed against the accused and the trial Court has erroneously invited convictions and sentences against him.

10. In support of the contentions put forth on the side of the appellant/accused, the following decisions are relied upon:

(a) CDJ 2010 MHC 7026 (Moorthy Vs. State rep. by Additional Superintendent of Police, ACB/CBI/Chennai), wherein this Court has held that "a digital recorder has been played in the presence of witnesses and found that conversation is not audible. The wrapper containing seal and signatures of the witnesses used for keeping the digital recorded is Ex.P17. Further, it is observed that having submitted the same to the Court without playing it, the Investigating Officer should have submitted a request to the Court to sent the digital recorder to the Forensic Lab for recording the matters recorded therein. Further it is observed that there is no requisite evidence for the purpose of proving demand as well as acceptable of bribe by the accused from PW2."

(b) In CDJ 2011 MHC 4937 (S.Kumar Vs. State, rep. by Inspector of Police, SPE/CBI/ACB) this Court has observed that "on careful scrutinisation of testimonies of PW5 and PW6, it is significant to note here that the appellant/first accused has not even handled the currency notes. This fact has also been admitted by PW7 stating that the accused had not handled the money on that day. But, he had received the cover containing money on that day. It is also significant to note here that during the time of the demonstration of sodium carbonate and phenolphthalein test, prior to coming to the

trap spot, phenolphthalein power was smeared on the currency notes and the envelop as well. As has been spoken to by PW7, the appellant/first accused has not handled and counted the tainted currency notes."

(c) In CDJ 2015 SC 815 (N. Sunkanna V. State of Andhra Pradesh), it is observed that "it is a settled law that mere possession recovery of currency notes from the accused without proof of demand will not bring home the offence under Section 7, since demand of illegal gratification is sine-quo-non to constitute the said offence."

11. From a cumulative reading of the decisions referred to earlier, it is made clear that in a case like this, the demand as well as acceptance of tainted money should be proved by the prosecution even without a speck of doubt.

12. In order to sustain the convictions and sentences passed by the trial Court, the learned Special Public Prosecutor has contended with great vehemence that in the instant case, demand as well as acceptance of tainted money by the appellant/accused have been clearly established by way of examining the defacto complainant, decoy witness, trap laying officer and Scientific Officer and the trial Court after considering the overwhelming evidence available on the side of the prosecution, has rightly invited convictions and sentences against the appellant/accused and the same are not liable to be interfered with.

13. On the basis of the divergent submissions and also on the basis of the dictum given by the Hon'ble Supreme Court, the Court has to meticulously analyse as to whether in the instant case, the alleged demand as well as acceptance of tainted money on the part of the appellant/accused have been clearly established on the side of the prosecution.

14. The defacto complainant viz., Vasudevan has been examined as PW2 and his specific evidence is that he and his wife are the Directors of the company by name M/s. Jayadasa Engineering and Exports Pvt. Ltd., and the same is situate at A-32, Sivakami Plots, No. 2, 3 Sivakamipuram, 1st Cross St., Chennai. The said Company has been doing business of commissioning installation repair and maintenance of electrical equipments. The said company has used to pay various taxes including service tax. For the year 2003-2004, an amount of Rs. 24,000/- has been paid and to that effect, a half yearly return has been filed on 13th May 2004. On 13th August, the accused has asked him to come to his office through his accountant by name Gunasekaran and accordingly he has gone to office of the accused for filing monthly return. At that time the accused has discussed about service tax and he explained that the tax already paid is erroneous. The accused has also directed to give split up bills separately for materials and labour. On 13th August 2004, the accused has

called him again over phone and demanded a bribe amount of Rs.25,000/- and also directed him to bring that amount on 23rd August 2004. Further the accused has told him that if the said amount is not paid, he would issue notice. Further he deposed in his evidence that he is not interested in paying bribe amount to the accused and due to that on 23.08.2004, he has gone to CBI office and given a complaint (Ex.P3). The Superintendent of Police directed him to meet the Inspector by name Moni and accordingly he met him and he directed to arrange money. Further he deposed that after arranging money, again he has come to CBI office at 01.00 pm. The Inspector Moni has arranged two independent witnesses namely Ramasubramaniam, Oriental Insurance Company and Ramanujam, Canara Bank. The said Inspector has made a pre-trap proceedings and subsequently tainted money of Rs.25,000/- has been put into a white cover and as per direction given by the Inspector of Police, he and the said Ramasubramaniam have gone to office of the accused at about 03.40 pm and met the accused. The accused has asked about Ramasubramaniam and he told that he has come there in relation to insurance related service tax matters. The accused has directed him to meet another person, adjacent to him. Further he deposed that the accused has asked him to come to 6th floor and accordingly both he and accused have come to 6th floor, in front of lift, the accused has asked him to give the amount and he has given the same to the accused and he put the same in right side pant pocket. Further he deposed to the effect that he has given pre-arranged signal to the Inspector of Police. The Inspector of Police and others have come to the place of the accused and asked him to the effect as to whether he has received bribe and after making proper identification, the Inspector has conducted Sodium Carbonate test. The accused has been asked to tip his right finger in the sodium carbonate solution and the same has turned pink colour. The accused has handed over tainted money to the Inspector and again the Inspector has conducted similar test.

15.The decoy witness by name Ramasubramaniam and trap laying officer have been examined as PW3 and PW4 and in fact, they deposed evidence as deposed by PW2, defacto complainant.

16.In fact, this Court has perused the entire evidence given by PWs.2 to 4 and ultimately found that the prosecution has clearly established the alleged demand of bribe of Rs.25,000/- from the defacto complainant and also acceptance. Since the prosecution, by way of examining PWs.2 to 4, has clearly established the essential ingredients of demand as well as acceptance, the Court can very well come to a conclusion that the accused has demanded Rs.25,000/- from the defacto complainant and accordingly the defacto complainant has given the same to the accused and accused has accepted the same.

17. Apart from the evidence given by PWs.2 to 4, one Banumathy, Scientific Officer has been examined as PW6 and her specific evidence is that in connection with the present case, four items of Material Objects have been received and all items have been analysed under the supervision of Assistant Director and both phenolphthalein and sodium carbonate are deducted in items 1 to 3. Since the evidence given by PW6 is inconsonance with the case of the prosecution, in fact, the evidence of PW6 has really strengthened the case of the prosecution.

18. The first and foremost attack made on the side of the appellant/accused is that the witnesses namely PWs.2 to 4 have consistently stated in their evidence that during the course of pre-trial proceedings, the alleged tainted money of Rs.25,000/- has been put in a white cover and the defacto complainant viz., PW2 has handed over the same to the accused and the said cover has also been subjected to necessary test. But for the reason best known to the prosecution, the same has not been marked as one of the material objects.

19. As rightly pointed out on the side of the prosecution, PWs.2 to 4 have clearly stated in their evidence that the tainted money of Rs.25,000/- have been put in a white cover. The specific evidence given by PW2 is that after demand made by the accused, he handed over the same to him and he kept the same in right pocket of his pant. But the said white cover has not been marked on the side of the prosecution.

20. The second contention put forth on the side of the appellant/accused is that the defacto complainant has been directed to record conversation between him and accused with aidance of a micro chip and the same has been marked as M.O.2. But the trial Court has failed to display the same at the time of trial.

21. In respect of the second contention put forth on the side of the appellant/accused also, necessary evidence is available on the side of the prosecution and the said micro chip has been marked as M.O.2. But as rightly pointed out on the side of the appellant/accused, the said micro chip has not been displayed by the trial Court at the time of trial.

22. The learned Senior Counsel appearing for the appellant/accused has advanced his entire argument only on the basis of the grounds mentioned supra. As pointed out earlier, the concerned white cover has not been marked on the side of the prosecution and further the concerned micro chip (M.O.2) has not been displayed by the trial Court at the time of trial.

23. At this juncture, the Court would like to point out that the entire case of the prosecution is not based upon the two aspects mentioned on the side of the appellant/accused.

24.It has already been pointed out that in a case like this, two aspects have to be established on the side of the prosecution. The first and foremost aspect is that the concerned accused should have demanded bribe amount and the second aspect is that on the basis of his demand, tainted money should be given to him and the concerned accused should have accepted the same. To put it in short, both the demand as well as acceptance are the essential features of Sections 7 and 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988.

25.In the present case, by way of examining the defacto complainant viz., PW2 the prosecution has clearly proved the demand of bribe alleged to have been made by the accused as well as acceptance of the same. The evidence given by PW2 has been clearly corroborated by decoy witness viz., PW3. Further the evidence given by PWs.2 and 3 have been clearly corroborated by PW4, trap laying officer. Apart from their evidence, Scientific Analyst has also clearly established the case of the prosecution.

26.As pointed out earlier, non marking of white cover as well as non playing of micro chip are not fatal to the case of the prosecution and those things are nothing but a piece of evidence and the same cannot be construed as a sole piece of evidence in the present case, since in the present case, both demand as well as acceptance of tainted money on the part of the accused have been clearly proved by the prosecution. Therefore, the contentions put forth on the side of the appellant/accused cannot be a basis for disbelieving the case of the prosecution.

27.Even at the risk of repetition, the Court would like to point out that PW2, defacto complainant has given picturesque evidence to the effect that the appellant/accused has demanded and accepted tainted money of Rs.25,000/- and since the said vital aspects have been clearly established on the side of the prosecution, it is very clear that the appellant/accused is liable to be convicted under the sections mentioned in the charge.

28.The trial Court after considering the replete evidence available on record has rightly found the appellant/accused guilty under the sections mentioned in the charge. In view of the discussions made earlier, this Court has not found any error nor illegality in the convictions and sentences passed by the trial Court and therefore, the present Criminal Appeal deserves to be dismissed.

29.In fine, this Criminal Appeal is dismissed. The convictions and sentences passed in Calendar Case No.6 of 2005 by the Special Court for CBI Cases/IX Additional Sessions Judge, Chennai are confirmed. If the appellant/accused is not

in duress, the trial Court is directed to take appropriate steps to imprison him to serve out the remaining period of sentence.

mj

s/d-
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrarmj

To

1. The Special Court for CBI cases and
IX Additional Sessions Judge, Chennai
 2. -do- thro the Principal Sessions Judge,
Chennai.
 3. The Inspector of Police,
CBI/ACB/Chennai.
 4. The Special Public Prosecutor,
High Court, Madras.
- + 2 ccs to M/s.A.Edwin Prabakar, Advocate SR 9192 & 9534

ug(co)
prk29/2

CrI.A.No.554 of 2009



WEB COPY