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IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

Crl.Appeal No.284 of 2007

The State by the Inspector of
Police, CBI/ACB/Chennai ... Appellant/Complainant

Vs

1. V.Vadiyalingam
S/o. Vairava Sundaram
No.21, Periyar Nagar
Anna Nagar, Peelamedu
Coimbatore - 641 004.
2. M.Padmanabhan
S/o. P.M.Krishnan
No.82A, Kaliappan Street,
K.K.Pudur,
Coimbatore - 641 038 ... Respondent/Accused 1 & 2

Prayer:- Criminal Appeal filed under Section 378 of Cr.P.C.,
against the order of the II Additional District Judge for CBI
cases, Coimbatore in C.C.No.1 of 2005 dated 15.11.2006
acquitting both the accused.

For Appellant : Mr.K.Srinivasan
Special Public Prosecutor for CBI

For Respondents : Mr.R.Gopinath, Senior Counsel
for C.Sivakumar

J U D G M E N T

This appeal has been preferred by the appellant/CBI
challenging the judgment of acquittal passed against the
respondents on 15.11.2006 in C.C.No.1 of 2005 on the file of II
Additional District Court, CBI Cases, Coimbatore.

2. The case of the prosecution is as follows:

(a) P.W.2/Suresh, the de facto complainant, in order to
start a PCB company wanted to register himself with the Central
Excise Department for Service Tax. Therefore, he went to the
Central Excise Office situate at Ramanathapuram, Coimbatore and
enquired one Vaidhiyalingam, A-1, who was the Superintendent,
Central Excise, dealing with issuance of service Tax
Registration Certificate. Accordingly, A-1 gave requisite form

(Ex.P2) to P.W.2 and the same was duly filled and submitted by P.W.2 along with two telephone Bill (Ex.P5) and Pan Application (Ex.P6) on 07.2.2004.

(b) On 20.5.2004, when P.W.2 enquired about the pending application, A1 asked him to come in person. Therefore, P.W.2 along with his wife/P.W.12 went to service tax division at 11.00 a.m and at that time, they were informed that the application was under processing. On 24.5.2001 at 2.30 p.m, when P.W.2 met A1, he asked P.W.2 to get STC and ST.1 forms from Gandhipuram. When P.W.2 bought those forms and came to office of A1, P.W.2 was asked to sit at A1 table and P.W.12 was directed to go to A2 table and fill up the form with the help of A2. When P.W.2 was alone, A1 demanded to give whatever he can give. Immediately, P.W.2 left the place. Thereafter on 04.6.2002, when P.W.2 contacted A2, he demanded a sum of Rs.2,000/- to issue Certificate. Hence, P.W.2 preferred Ex.P.7/Complaint.

(c) On receiving the complaint, the Superintendent of Police, Vigilance and Anti-Corruption forwarded the same to P.W.9/ Inspector of Police. P.W.9, after registering the complaint, recorded the statement of the complainant, P.W.2. Thereafter, on making necessary arrangements, the trap party went to the office of the respondents/accused along with the witnesses.

(d) After reaching the office of the respondents/accused when P.W.2 and P.W.3, shadow witness went inside the office to the meet the accused and A1 gave a form and asked P.W.1 to take photo copy of it and get it filled. P.W.2 sent P.W.3 to take photo copy of the form (Ex.P9) and submitted it to A1. As directed by A1, P.W.2 filled the date as 07.6.2004. A1 gave temporary letter of allotment of service Tax Code (EX.P11) and certificate of registration (Ex.P12), got the acknowledgment for the same from P.W.2 and then demanded money. When money was offered, A1 directed P.W.2 to hand over money to A2. A2 received the tainted money from P.W.2 in his right hand and put it into his right side table drawer. At that time, P.W.2 made a signal to the trap team and immediately, P.W.9 rushed into the scene of occurrence and seized the tainted money in the presence of the official witnesses. Immediately, the respondents/accused were arrested and phenolphthalein test was conducted. Thereafter, P.W.9 seized the money under Ex.P.14/recovery Mahazar and he also prepared Ex.P.16/Rough Sketch.

(e) P.W.9 also examined the witnesses and recorded their statements. After obtaining sanction order from P.W.1/Palaniyandi and P.W.4, Dwivedi, Joint Commissioner and Commissioner of the Central Excise Department respectively and after completing the investigation filed the charge sheet under Section 120 B IPC read with Section 7 and 13 (2) read with 13(1) (d) of Prevention of Corruption Act, 1988. As the respondents/accused pleaded not guilty, the case was posted for trial.

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3. Before the Court below, 12 witnesses were examined and Exs.P.1 to P.25 were marked on the side of the prosecution,

apart from marking material objects, M.Os.1 to 3. On the side of the respondents / accused, no witness was examined and no document or material object was marked.

4. Even though charges were levelled against the respondent under Section 120 B IPC read with Section 7 and 13 (2) read with 13(1) (d) of Prevention of Corruption Act, 1988, the Trial Court, after considering oral and documentary evidence, had acquitted the accused from the charges levelled against them. Challenging the same, the present appeal came to be filed by CBI.

5. The learned Special Public Prosecutor appearing for the appellant submitted that though the demand of illegal gratification has been very well established by the prosecution, the Trial Court disbelieved the case, which is not sustainable in law. The learned Special Public Prosecutor further submitted that the accused conspired together and obtained illegal gratification and the same was clearly established by the prosecution by way of oral and documentary evidence. Similarly, acceptance of money was also established by conducting Phenolphthalein test. Therefore, the learned Special Public Prosecutor prayed for allowing the appeal.

6. Resisting the same, the learned counsel appearing for the respondents/accused would submit that the prosecution has not established the guilt beyond reasonable doubt, in respect of demand and the alleged illegal gratification received by the respondents and hence, the Court below has rightly acquitted the respondents. The learned counsel further submitted that 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. Proper proof of demand and acceptance of illegal gratification are the vital ingredients, necessary to be established to procure a conviction for the offences under Prevention of Corruption Act..The mere recovery by itself cannot prove the charge of the prosecution against the accused. In the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe, conviction cannot be sustained. The learned counsel further submitted that there is a delay in forwarding the FIR to the Court and the same has not been properly explained by the prosecution. The learned counsel further submitted that contradiction found in the manner in which the tainted currency was received and recovered creates serious doubt about the prosecution story. The learned counsel for the respondents/accused submitted that the Trial Court, after appreciating the entire oral and documentary evidence, has rightly come to the conclusion that the prosecution has miserably failed to establish the guilt of the accused. Therefore, according to the learned counsel, the judgment of the trial Court is in order and no interference is warranted.

7. I have heard the rival submission made by the learned counsel on either side and perused the materials available on record.

8. According to the prosecution, P.W.2, in order to start PCB Company, wanted to register himself with the Central Excise Department and for which, he approached the accused and submitted an application for registration. While the said application was pending, P.W.2 went to the Central Excise Office situated at Ramanathapuram, Coimbatore and enquired Vaidhiyalingham A-1, who was the superintendent of Central Excise dealing with issuance of service Tax Registration Certificate. It is alleged that the accused have demanded bribe of Rs.2,000/- as illegal gratification to process the said application. Hence, P.W.2 preferred Ex.P.7/Complaint. On the basis of the said complaint, the trap proceeding was initiated and after following the procedure, the respondent/accused was arrested and after completing the investigation, the charge sheet has been levelled against the accused.

9. In this back ground, the point to be decided in this appeal is whether the judgment of acquittal passed by the Trial Court is sustainable ?

10. It is a well settled dictum of the Hon'ble Apex Court that unless the judgment of acquittal is found to be perverse or suffer any material irregularity, the appellate Court cannot interfere with the finding of the Trial Court. Furthermore, it is also a well settled dictum of the Hon'ble Apex Court that if two views are possible, then the view favouring the accused has to be taken into consideration.

11. The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the Act 1988. Mere recovery of tainted money is not sufficient to convict the accused, when the substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as bribe.

12. To be noted, mere receipt of amount by the accused is not sufficient to fasten the guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification, but the burden rests on the accused to displace the statutory presumption raised under Section 20 of the Act 1988, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the Act, 1988.

13. It is worthy to mention while invoking the provisions of Section 20 of the Act, the Court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution.

14. With this background of principles, now this Court has to examine the oral and documentary evidence adduced by the prosecution.

15. P.W.2, in his chief examination, deposed that there were four incidents of demand for illegal gratification. He has stated that on 24.5.2004 (first incident), A1 told him to give whatever he can give. P.W.2, in his evidence, further stated that in the second incident of demand, i.e. on 04.6.2004, A2 demanded Rs.2,000/- and at that time, A2 told him that normally he used to ask Rs.3,000 or Rs.4,000/- but for him he asked only Rs.2,000/-. In the third incident, i.e. on 06.6.2004, A1 asked P.W.2 whether he has brought money. In the fourth incident, i.e. on 07.06.2004 when P.W.2 went to Central Excise Office and after submitting new application form and PAN card, A1 gave the service Code allotment letter (Ex.P11) and the temporary certificate (Ex.P12) and thereafter demanded money. When P.W.2 offered to give money, A1 directed to give it to A2, who, in turn, received the same and kept it in the right side of the table drawer. Whereas the evidence of P.W.12, who is none other other than the wife of P.W.2, is contradictory to the evidence of P.W.2. Insofar as the first incident is concerned, P.W.12 in her examination in-Chief has stated that she accompanied P.W.2 to Central Excise Office on that date. She deposed that she heard only a word "formalities" and nothing else.

16. Similarly, in the complaint, it is stated that the alleged demand of Rs.2,000/- was made by A2 over phone on 04.5.2004 (the second incident). Whereas in the Chief examination, P.W.2 has stated that he called the central Excise Office and enquired A-2 over phone and at that time A2 demanded Rs.2,000/-. Further, in the cross examination, he has stated that he is not sure that the person who spoke on the other hand and demanded money was Padmanabhan (A2).

17. Coming to the next incident, it is seen that in the Chief examination, P.W.2 says that after handing over Ex.P11 allotment letter and Ex.P12 registration certificate, A1 demanded money and when the same was offered he directed to give it to A2, who, in turn, received the same and kept in the right side drawer. Whereas P.W.3 says that A1 told the certificates are ready and whether P.W.2 has brought money and asked to give the money to A2. From the above, it is clear that the demand for illegal gratification as put forth by prosecution lack reliable and credible corroboration.

18. As regards the recovery of money, there is a deviation with regard to the exact place from where the tainted money was recovered. P.W.2 has stated that A2 obtained money from him and kept it in on the right side of the table. In the cross examination, he has stated that the money was recovered from the table drawer. P.W.3 has stated that A2 received money and kept it in the right side table drawer. In the recovery mahazar, Ex.P14 it is recorded that the money was recovered from the right side drawer. The rough sketch Ex.P16 shows the scene of trap. In that sketch, six tables including one computer table

was noted. But there was no indication in it, from which table the tainted money was recovered.

19. That apart, it has been clearly established that P.W.9 held both the hands of A2 before phenolphthalein test and both hands were proved to contain phenolphthalein. Whereas the evidence of P.W.2 and P.W.3 is that A2 received the tainted money in his right hand. Further, police have failed to obtain the signature of the accused on the label of the bottle, contain the hand wash. The court below considered the facts properly and appreciated the evidence in correct perspective and then reached the conclusion that the charges have not been proved against the respondents/accused beyond reasonable doubt.

20. Yet another contention of the learned Special Public Prosecutor is that since the phenolphthalein test is found to be positive, the Trial Court ought to have convicted the respondents/accused, whereas the Trial Court had acquitted the respondents/accused. So, the learned Special Public Prosecutor would contend that the judgment of acquittal passed by the Trial Court is perverse and hence, he prayed for allowing the appeal.

21. It is well settled that mere recovery by itself cannot prove the charge of the prosecution against the accused. In the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe, conviction cannot be ordered.

22. It has been made clear by the Hon'ble Supreme Court in catena of judgments that mere recovery of money from the accused itself cannot be a proof to convict the accused, in the absence of any evidence to prove the payment of bribe or evidence to show that the accused voluntarily accepted the money knowing it to be bribe.

23. In A.Subair vs. State of Kerala, reported in (2010) 1 MLJ (Cr1) 995, the Hon'ble Supreme Court has held as follows :

"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."

It has been further held in the aforesaid decision that sub-section (3) of Section 20 of Prevention of Corruption Act, 1988 is a non-obstante clause. It provides that where gratification is trivial and the Court is of the opinion that no inference of corruption may fairly be drawn, it may decline to draw the presumption as referred to in sub-sections (1)

and (2) of Section 20 of the Prevention of Corruption Act, 1988. In other words, the Court is not bound to draw a presumption under Section 20 where the alleged gratification is too trivial. In this decision, it has been categorically ruled that the prosecution has to prove the charge beyond reasonable doubt like any other offence and the accused should be considered innocent till the guilt is established. Proper proof of demand and acceptance of illegal gratification are the vital ingredients, necessary to be established to procure a conviction for the offences under Prevention of Corruption Act.

24. In *Banari Dass vs. State of Haryana*, reported in (2010) 3 MLJ (Crl) 132, the Hon'ble Apex Court held as follows :

"11.To constitute an offence under Section 161 of the IPC, it is necessary for the prosecution to prove that there was demand of money and the same was voluntarily accepted by the accused. Similarly, in terms of Section 5 (1) (d) of the Act, the demand and acceptance of the money for doing a favour in discharge of its official duties is sine qua non to the conviction of the accused..."

25. In *Govindasamy vs. State*, reported in (2011) 3 MLJ (Crl) 455, this Court relying on various decisions of the Hon'ble Apex Court held that culpability of mind of an accused, coupled with actus rea, has to be established by the prosecution, based on the available evidence on record to sustain the conviction against the accused under Prevention of Corruption Act, without any deviation from the basic principles of criminal jurisprudence and the Indian Evidence Act. Mere recovery of tainted money by itself cannot establish the charge of acceptance of illegal gratification in the absence of any evidence to prove the payment as illegal gratification or to show that the accused had voluntarily accepted money knowing it as bribe.

26. In *V.Venkata Subbarao v. State* (2007) 3 SCC 175, the Hon'ble Supreme Court has held that in the absence of a proof of demand, the question of raising the presumption would not arise. The Hon'ble Supreme Court has further held that Section 20 of the Prevention of Corruption Act, 1988 provides for raising of a presumption only if a demand is proved.

27. In the instant case, as discussed supra, the prosecution has miserably failed to prove that the money was demanded by the accused. Further, P.W.12 has not corroborated the evidence of P.W.2. More so, P.W.3 in chief examination has stated that the money was demanded by the accused and after receipt of the money the certificate was issued. But to the contra, in Ex.P14 the Recovery Mahazar, it is stated that the

certificate was issued and then the money was handed over to A2. Further P.W.3 in the cross examination has stated that he did not hear the conversation between A1 and P.W.2. He has also stated that A2 has not received the amount as per the instruction of A1. Therefore, the evidence of P.W.3 with regard to alleged demand at the time of occurrence is not definite and the same cannot be believed.

28. More so, the evidence of P.W.2 and P.W.3 are contradictory to each other with regard to the alleged demand and handing over the money at the time of the trap. P.W.2 in his evidence has stated that the certificate was given to him and then the accused has demanded money. Whereas P.W.3 the accompanying witness, has stated that the demand was made and the money was received by A2 prior to the issuance of the Registration Certificate.

29. That apart, there cannot be enquiry without registering a criminal case. Even as per Cr.P.C. Investigation starts only after registration of the FIR. But in the instant case, the entire proceeding done by P.W.9 prior to the registration of FIR which is illegal and on that ground alone the prosecution fails.

30. Even though Ex.P25, FIR alleged to have been prepared on 07.6.2004 at 11 p.m, the same was sent to Court only on 10.6.2004 at 2.00 p.m. Similarly, Ex.P8 and P.14 both the mahazars, are alleged to have been prepared on 07.6.2004 but the same have been sent to Court only on 17.6.2004. Likewise, MO.1 and MO.2, the bottles containing the solutions of Phenolphthalein test reached the Court only on 17.6.2004 i.e. after a delay of 10 days. It is admitted by P.W.10 that two solutions in M.O.1 and MO.2 were prepared on the same day. i.e. 07.6.2004. The aforesaid inordinate delay in despatching Ex.P1 to Ex.P16 as well as the delay in sending M.O.1 and M.O.2 to Court create serious doubt about the prosecution case.

31. In CHIDAMBARAM V. STATE REP.BY THE INSPECTOR OF POLICE, CENTRAL BUREAU OF INVESTIGATION (2007) 2 MLJ (Cr1) 931, this Court has held that an investigation before registering the First Information Report is bad in law, when the very existence of complaint itself before the commencement of the investigation is doubtful. The said judgment squarely applies to the facts of the present case as in the instant case also investigation starts only after registration of the FIR.

32. Yet another fact which vitiates prosecution is that P.W.2 has not chosen to inform the alleged demand made by the accused to the superior officers of the accused, who were in the very same building. The said fact also creates serious doubt about the prosecution theory.

33. It is also the case of the prosecution that A1 and A2 conspired together and demanded and accepted the bribe. It is alleged by the prosecution that at the time of alleged trap A1 demanded money and when the same was offered, A1 asked P.W2 to hand over money to A2. Whereas P.W.3 in his cross examination

has admitted that A2 has not received the alleged bribe at the instruction of the A1. There is no substantive evidence to prove that both the accused agreed to share the alleged bribe. An analysis of the entire evidence of the official witness reveals that the prosecution has miserably failed to establish the theory of conspiracy.

34. Considering all the above aspects, I am of the considered view that the Trial Court has considered the matter in proper perspective and came to a correct conclusion. Hence, the judgment of acquittal passed by the Trial Court is a well reasoned one and the same does not warrant interference by this Court.

35. In fine,
(a) The Criminal Appeal is dismissed.
(b) The judgment of acquittal passed by the II Additional District Court for CBI cases, Coimbatore, on 15.11.2006 in C.C.No.1 of 2005 is hereby confirmed.

Sd/-
Assistant Registrar(CS VIII)

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Sub Assistant Registrar

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To

1.The II Additional District Judge,
CBI cases, Coimbatore.

2.The Special Public Prosecutor,
High Court of Madras.

3.The Inspector of Police,
CBI/ACB/Chennai.

4.The Record Keeper,
Criminal Section,
High Court of Madras.

+lcc to Mr.K.Srinivasan, Special Public Prosecutor for
CBI Cases, S.R.No.43201

Cr1.Appeal No.284 of 2007

PPA(CO)
CA(28/06/2017)