IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 562 OF 2014

Prakash Manohar Kasar	]
Age: 60 years, Occu: Retired	]
R/o. 11, Kusumagraj Hsg. Soc.,	]
Nashik Road, Nashik.	]..Appellant (Ori. Accused No. 1)
v/s.	
The State of Maharashtra	]
(Through Senior Police Inspector,	]
Anti Corruption Bureau, Nashik	] ..Respondent (Ori. Complainant)

Ms. Babita P. Pandey for Appellant in appeal No. 562 of 2014.
Mr. S.S. Pednekar-APP for the State.

CORAM: SMT. SADHANA S. JADHAV, J.

DATE : 22nd February, 2019.

JUDGMENT :-

1. Heard. The appellant herein along with Ramdas Tadge are convicted vide judgment and order dated 27th May 2014 passed by the Additional Sessions Judge, Malegaon, District-Nashik in Special (A.C.B.) Case No. 01 of 2008 for the offence punishable under section 7 and 12 of the Prevention of Corruption Act, 1988 and to pay fine of Rs.2000/- in default, to suffer R.I. for two months.

He is also convicted for the offence punishable under section 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988 and sentenced to suffer R.I. for two years and to pay fine of Rs. 2,000/-, in default, to suffer R.I. for two months.

2. Such of the facts necessary for the decision of this appeal are as follows:

3. The appellant herein was working as an Auditor in the office of Registrar, Co-operative Society's, Malegaon. The work of auditing in all various Co-operative Societies were entrusted with the present appellant. One Mr. Ramdas Tadge was working as a Clerk in the office of District Sub-Auditor along with the present appellant. He was holding the charge as Auditor and Senior Clerk.

4. On 25th July 2006, Mr. Sunil Bankar who was serving with Sonaj Vividh Karyakari Seva Sahakari Society Ltd., (hereinafter referred to as 'Society') at Malegaon had approached the office of the Anti Corruption Bureau at Nashik (for short 'the A.C.B.') contending therein that the accounts of his office were being audited by the present appellant. The records of the society were taken by the accused No. 2 i.e. Mr. Tadge. They had found certain lacunas and he had called upon Mr. Bankar and demanded illegal gratification. The A.C.B. had therefore, decided to lay a trap. After completing the Pre-trap panchnama and giving requisite instructions to the Panchas and the complainant, the A.C.B. had been to the office of the Co-

operative Societies at Malegaon. On 25th July 2006 the complainant had been to the office and had requested the present appellant to prepare the audit report properly. It is alleged that the appellant herein had questioned the complainant as to whether he was ready to fulfill the demand. It is alleged that he had demanded an amount of Rs. 8,000/- as an illegal gratification. And after negotiation, it was settled to Rs. 5,500/-. He had paid Rs.2,500/- to the appellant and had assured the auditor, that he would pay the rest of the amount of Rs.5,500/-subsequently at the earliest. Since the complainant was not willing to pay the amount he had approached the office of the Anti Corruption Bureau.

5. In the meanwhile, the accused no.2 had been to the office, and at that time the present appellant had informed the complainant to handover the said amount to Mr. Tadge who had accepted the said amount, retained it and placed it in his hip pocket of the pant. The pre-determined signal was given by the complainant, the accused was apprehended by the raiding team. The post trap panchnama was prepared and then PW-5 had lodged the report on behalf of the State. On the basis of which Crime No. 3043 of 2006 was registered at the Police Station against the appellant and Mr. Tadge for the offence punishable punishable under section 7 and 13(1) (d) read with 13(2) of the Prevention of Corruption Act, 1988.

6. The case rests upon the evidence of PW-1 the original complainant, PW-2 who is the shadow witness, PW-3 Sudhakar Mehakarkar Sanctioning Authority.

7. PW-1 Sunil Bankar-the complainant has deposed in consonance with the report lodged by him at the Anti Corruption Bureau. At the trial in the cross-examination PW-1 has categorically admitted that he had not deposited the audit fees prior to 12th July 2006, it is admitted in the following words":-

> *"It is true that till the date of present trap, the audit fees was not deposited by us." i.e. by the Society.*
>
> *"It is true that as a bribe, neither I paid the amount nor the same was accepted by accused".*

8. It is also a matter of record that the appellant herein had marked certain lacunas in the records of the co-operative society and brought it to the notice of PW-1 and had informed him that said lacunas need to be corrected. PW-1 was also informed that it would be necessary to deposit the audit fees.

9. In fact, by way of cross-examination it is brought on record by the defence that the performance of the society was so poor that it was classified in 'C' Category. In order to save the society, from, once again being classified in 'C' Category, in order to save the society, a plot was hatched by the Secretary of the society to

implicate the accused and stigmatize the officers. It was a frail attempt by the Complainant to demonstrate that the classification was being made by the auditor by adopting illegal means.

10. Upon perusal of the records and proceedings and the statement of the present appellant, given to the Investigating Officer, at the threshold, soon after the trap, shows that the appellant had asked PW-1 to deposit the audit fees. That the amount, which was paid at the time of trap, was counted by Mr. Tadge and he had informed the superior officer that the amount towards audit fees was not fully paid and therefore, the appellant had instructed Mr. Tadge not to accept the amount unless he paid the complete the audit fees is deposited. At that juncture, the complainant had coaxed Mr. Tadge to have a cup of tea and was insisting upon him to accept the amount and help him and it was at that juncture the raiding party had apprehended the original accused no. 2 Mr. Tadge.

11. It is the case of the prosecution that the amount was accepted by the Mr. Tadge in the cabin of the present appellant. However, the evidence of PW-5 falsifies the same, as according to him he had actually seen a person wearing checks shirt, accepting the amount on the road. In the eventuality, that the amount is paid to the accused no. 1 in the cabin, there was no occasion for the raiding party to see the act of acceptance and in light of this, the reasons for cross examining the witnesses on the point of scene of offence at length, would assume importance. It is therefore, clear

that the prosecution has initially failed to establish the place where the amount was accepted, to the extent as to whether it was paid in the cabin or in the premises of the Market Yard.

12. The records also show that there was a demand note of Rs. 11,100/- towards audit fees and the complainant had brought Rs. 5,500/- towards the audit fees.

13. The complainant had in fact lodged a report to the A.C.B. only against the present appellant as the amount was demanded by the appellant and he had allegedly asked appellant no. 1 to accept the amount since he was in the office of the present appellant and the same was recovered from the possession of Mr. Tadge. The records of the office are accepted.

14. PW-2 who happens to be the shadow witness has reiterated that when he had met appellant in the cabin along with PW-1, Mr. Tadge had entered the office and the appellant had directed PW-1 to deposit the amount with PW-2.

15. PW-3 is the Sanctioning Authority- Mr. Sudhakar Mehakarkar and according to him he had granted sanction after due application of mind.

16. P.W.-4 who is Special Auditor, Class-II, Co-operative Societies, Flying Squad, Nashik. He has deposed before the Court

that audit department would charge the audit fees as per the working capital of the society. After calculation of the fees the same has to be deposited by c*hallan* in treasury.

17. P.W.-5 Mr. Bhimashankar Dhole is the investigating officer and he has specifically stated that at the time of trap they found one bank passbook, office key, handkerchief with Mr. Tadge, which they returned to him. *They asked Shri Tadge about the bribe amount and he replied that the appellant i.e. Mr. Kasar had told him to deposit Rs. 25,000/- towards audit fees.* The statement of both the accused are in their own handwriting.

18. The accused No. 2 is the appellant in Criminal Appeal No. 497 of 2014 and he has been acquitted on the ground that he had not demanded gratification and had only accepted the amount as per the instructions of his senior i.e. the present appellant.

Implicit reliance was placed on the judgment of the Apex Court in the case of *C. Sukumaran Vs. State of Kerala reported in (2015) 11 Supreme Court Cases 314],* wherein the Hon'ble Apex Court has held thus:-

> "It has been continuously held by this Court in a Catena of cases after interpretation of the provisions of Section 7 and 13 (1) (d) of the Act that the demand of illegal gratification by the accused is the sine qua non for constituting an offence under the provision of the Act. Thus, the burden to prove the accusation against the appellant for the offence punishable under section 13 (1) (d) of the Act with regard

> to the acceptance of illegal gratification from the complainant PW2, lies on the prosecution".

19. As far as the present appellant is concerned, it is alleged that the initial demand was made by the present appellant.

20. Section 7 A of the Prevention of Corruption Act specifically contemplates that *"even an attempt to obtain an undue advantage would amount to an offence".*

21. In view of the above discussion, it would be necessary to appreciate the case of the prosecution in consonance with the defence of the accused. It is defence of the accused that the amount was being expended towards depositing of audit fees.

22. The records indicated Rs.25,000/- but the society was placed in 'C' category for the preceding two years and therefore, their audit fees would be Rs.11,100/-. The complainant was insisting upon 50% of the audit fees in order to undertake the work of the audit and give a favourable report. The appellant was insisting upon payment of full audit fees and hence he has been falsely implicated. The accused-appellant has placed reliance on the records of the society which is perused by this Court as it forms a part of records and proceedings. The prosecution witnesses have also stated that the records done indicate that the said society had not deposited the audit fees.

In the case of *C.M. Girish Babu Vs. CBI reported in (2009) 3 SCC 779,* the Apex Court has held as follows:-

> "It is well settled that the presumption to be drawn under Section 20 is not an inviolable one. The accused charged with the offence could rebut it either through the cross-examination of the witnesses cited against him or by adducing reliable evidence.
>
> It is equally well settled that the burden of proof placed upon the accused person against whom the presumption is made under Section 20 of the Act is not akin to that of burden placed on the prosecution to prove the case beyond a reasonable doubt."

23. In the present case the accused-appellant has not only rebutted the presumption through cross-examination of the witnesses but at the threshold itself i.e. at the time of trap when he was not expected to be in a proper frame of mind, submitted, in his own handwriting that he had demanded only audit fees and not gratification. It is specifically admitted by PW-1 that he had not deposited the audit fees. Hence, it can be safely inferred that the appellant has rebutted the presumption under section 20 by way of cross-examination and on the basis of the records seized by the raiding party.

In the case of *Trilok Chand Jain Vs. State of Delhi reported in AIR 1977 Supreme Court Cases 666,* the Apex Court has held as follows:-

> "The degree and the character of the burden of proof which section 4 (1) casts on an accused person to rebut the presumption raised thereunder, cannot be equated

> with the degree and character of proof which under Section 101. Evidence Act rests on the presumption. The presumption therefore can be used in furtherance of the prosecution case and not in derogation of it. If the story set up by the prosecution inherently militates against or is inconsistent with the fact presumed, the presumption will be rendered sterile from its very inception, if out of judicial courtesy it cannot be rejected out of hand as still-born."

24. Moreover, this Court is of the opinion that the explanation given by the accused soon after trap stands on a higher footing than any other material adduced by the accused by way of cross-examination or under Section 313 of the Cr.P.C, since it is not suggested by an advocate.

25. First and foremost the prosecution has failed to establish the very location where the amount was passed by PW-1 to Mr. Tadge and the said fact goes to the root of the matter. If that the case of the prosecution is to be considered then it can not be said that the amount was accepted in the presence of the present appellant or at his behest in any case Mr. Tadge is acquitted on the ground that even according to the prosecution he had not demanded the said amount.

26. In view of the above discussion, the appellant herein deserves to be acquitted of all the charges framed against him. The appellant has retired on superannuation. The appeal is allowed.

ORDER

i) The Appeal is allowed and stands disposed of.

ii) The judgment and order dated 27.5. 2014 passed by the Additional Sessions Judge, Malegaon, District-Nashik in Special (A.C.B.) Case No. 01 of 2008 is hereby quashed and set aside .

iii) The Appellant is acquitted of the offences punishable under Sections 7, 12 and 13 (1) (d) r.w. section 13(2) of the Prevention of Corruption Act, 1988.

iv) Bail bonds are cancelled.

v) Fine amount, if paid, be refunded.

vi) Writ be issued expeditiously.

(SMT. SADHANA S. JADHAV, J)