

In the High Court of Punjab and Haryana, at Chandigarh

Criminal Appeal No. S-732 of 2020 (O&M)

Date of Decision: 23.06.2020

Babli Devi

... Appellant(s)

Versus

State of Haryana

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal

Present: Mr. R.N.Lohan, Advocate
for the appellant(s).

Mr. Deepak Sabharwal, Additional Advocate
General, Haryana for the respondent.

Anil Kshetarpal, J.

Through this appeal, the appellant assails the correctness of the judgement of conviction and order of sentence dated 14.02.2020, passed by the learned Additional Sessions Judge, Kurukshetra convicting her for offences under Section 409 IPC as well as under Section 13(1)(c) of the Prevention of Corruption Act, 1988 (hereinafter referred to as “the 1988 Act”). The relevant part of the order of sentence reads as under:

“Under Section 409 IPC: To undergo rigorous imprisonment for a period of four years and to pay fine of Rs.20,000 (Rs. Twenty Thousand only). In case of default in payment of fine, the convict shall have to undergo rigorous imprisonment for a period of six months in addition.

Under Section 13(1)(c) of the Prevention of Corruption Act, 1988: To undergo rigorous imprisonment for a period of four

years and to pay fine of Rs.20,000 (Rs. Twenty Thousand only).

In case of default in payment of fine, the convict shall have to undergo rigorous imprisonment for a period of six months in addition.”

FACTS

FIR came to be registered on basis of an inquiry conducted by Inspector Raj Pal, State Vigilance Bureau, Sub Division, Kurukshetra. The Inquiry Officer found that appellant-Babli Devi in collusion with Sunil Kumar Junior Engineer, Baldev Singh Mate, Shyam Lal her brother-in-law and other account holders named in the report, misappropriated an amount of Rs.5,96,339/- from the funds received by the Gram Panchayat under the National Rural Employment Guarantee Scheme (NREGA) by falsely showing the execution of work while engaging labour under the above said Scheme. At the relevant time, the appellant Babli Devi the Sarpanch of Gram Panchayat of Village Adhon, received an amount of Rs.24,91,487/- during the period from 31.12.2008 to 29.07.2009. It was found in the inquiry that the Sarpanch had falsely projected that Linda Nullah (Drain) was got dug by engaging labourers, whereas in fact the aforesaid drain had already been dug. Further, 1,00,000 bricks were purchased for construction of the boundary wall of a pond, but more than 50% of the bricks purchased were used by the Sarpanch in the construction of her own house. It was also found that sub standard material has been used in the construction of boundary wall, resulting in syphoning of the public money.

On completion of the investigation, a report under Section 173

Cr.P.C. was presented in the Court. After considering the material collected

by the Investigating Agency, the Court reached at a conclusion that a prima facie case for commission of offences punishable under Section 409 IPC and Section 13(2) of the 1988 Act against appellant-Babli Devi and Sections 120-B, 420 IPC read with Section 120-B IPC, 467, 468 and 471 IPC against all the accused was made out. Accordingly, the accused persons were charged by the Court vide order dated 16.07.2018 to which they denied and claimed trial.

The prosecution, in order to bring home the guilt of the accused, examined 25 witnesses apart from producing various documents. The list of witnesses examined and the documents produced are extracted as under:

- “PW1 - EASI Balwan Singh*
- PW2 - Raj Rishi*
- PW3 - Gian Chand,*
- PW4 - Surmukh Singh*
- PW5 - Sat Parkash*
- PW6 - HC Ankush*
- PW7 - Bhushan Lal Goel,*
- PW8 - Joginder Dass, Assistant*
- PW9 - Roshan Lal, Assistant*
- PW10- Vinod Kumar Kamboj, SE*
- PW11 - Inspector Harvinder Singh*
- PW12- Narata Ram, (Retd. SDO)*
- PW13- Parveen Kumar, Sub Inspector*
- PW14- HC Tejbir Singh*

- PW15 - SI Anish Malik*
- PW16 - Manish Kumar, Addl. Branch Manager, Union Bank of India*
- PW17 - Inspector Raj Kumar (Retired)*
- PW18 - Jaspal, Gram Sachiv*
- PW19 - Ram Dutt, DSP*
- PW20 - Rohtash, Gram Sachiv*
- PW21 - Ishwar Chand (Retd. Tehsildar)*
- PW22 - Inspector Raj Pal*
- PW23 - Shri Ashok Kumar Meena, IAS, D.C. Hisar*
- PW24 - Dr. Satish Kumar, Assistant Director, FSL*
- PW25 - Sandeep, JE*
- XXXX XXXX XXXX XXX XXXX*
- Ex.P1 - Copy of FIR*
- Ex.P2 - Endorsement with regard to registration of FIR on the complaint Ex.P38*
- Ex.P3 - Recovery memo of record*
- Ex.P4 - Recovery memo of enquiry No.1/2010*
- Ex.P5 - Copy of statement of Raj Rishi*
- Ex.P6 - Copy of application moved by Shyam Lal*
- Ex.P7 - Copy of application moved Sunil Kumar*
- Ex.P8 - Sanction order for prosecution of accused Sunil Kumar*
- Ex.P9 - Copy of letter dated 30.9.2016*
- Ex.P10- Recovery memo of posting order of accused Sunil Kumar*
- Ex.P11 - Technical report of the work*

*Ex.P12 &- Presence of official/officer at the time of
Ex.P13 preparation of inspection of spot*

Ex.P14 - FSL report

*Ex.P15 - Recovery memo of record with regards to
assessment report*

*Ex.P16 &- Copy of entry M.B. Books
Ex.P17*

Ex.P17 - Recovery of statement of account

Ex.P18 to Ex.P23 - -

Ex.P24 - Measurement Book

Ex.P25 - Statement of Smt. Babli Devi

Ex.P26to- Specimen signatures of Smt. Babli Devi put by

Ex.P30 accused Shyam Lal

*Ex.P31to- Specimen signature of Smt. Babli Devi
Ex.P36*

Ex.P37 - Copy of Enquiry report

Ex.P38 - Complaint

Ex.P39 - Report of FSL

Mark-B - Copy of Measure Book

XXXX XXXX XXXX XXX XXXX

Ex.P3 - Recovery memo of photocopy of demand draft etc.

*Ex.P4&- Photocopy of demand drafts
Ex.P5*

Ex.P16 - Statement of bank account

Ex.P17 - Recovery memo of bank statement.

Ex.P25 - Measurement Book

Ex.P26 - Stock Register

Ex.P27 - Proceeding register

Ex.P28 - Recovery memo of entries of M.B.Books”

After conclusion of the evidence of the prosecution witnesses, the statements of the accused under Section 313 Cr.P.C. were recorded. On being confronted with the evidence produced by the prosecution, the accused claimed innocence and false implication. The accused, in their defence, examined the following witnesses and produced following documents:

“DW1 Stanley, Clerk of Shri P.C.Aggarwal, Advocate

DW2 Satpal Sharma, SDO

DW3 Sunil Bedi, Manager, Union Bank of India

XXXX XXXX XXXX XXX XXXX

Ex.D1 Copy of statement of Surmukh Singh,

*Ex.D2& Copy of statement of Sat Parkash
Ex.D3*

Ex.DW1/A Copy of entry of register of Notary Public

*Ex.DW2/1 to Copy of letters with regards to transfer of
Ex.DW.2/10 amount in the account of Gram Panchayat*

Ex.DW3/1 to Copy of statement of bank account of Gram

Ex.DW3/193 Panchayat Adhon”

The learned trial Court, on appreciation of evidence, acquitted accused Shyam Lal and Sunil Kumar, but convicted appellant-Babli Devi for the offences punishable under Section 409 IPC and Section 13(1)(c) of the 1988 Act.

This Court has heard learned counsel for the appellant and the counsel representing the State of Haryana and with their able assistance, gone through the record requisitioned along with the judgement impugned

herein.

Learned counsel for the appellant has submitted that the date on which the alleged sample had been drawn/taken is not clear. The alleged sample was also never drawn in the presence of the appellant and the result of the sample has also not been linked with the alleged sample drawn from the retaining wall. The learned trial Court was wrong in basing its judgement of conviction merely on the basis of report of the Forensic Science Laboratory. No fresh sample was drawn after registration of the FIR. The link evidence is missing. In the absence of sanction, the appellant could not be prosecuted and thereafter convicted.

On the other hand, learned counsel appearing for the State of Haryana has submitted that the sample was drawn by Sh. Vinod Kumar Kamboj during his visit to the site on 30.06.2010 and 17.10.2010 in the presence of accused Shyam Lal and Sunil Kumar. He further pointed out that the husband of appellant, Ram Chander, was also present. The drawing of the sample from the retaining wall has been proved by Sh. Vinod Kumar Kamboj PW.10. The appellant remained Sarpanch during the term 2005 to 2010, whereas the cognizance of the case was taken up by the Court on 16.07.2018, hence the sanction of the Government was not necessary. Still further, the user of the sub standard material is not connected with the duties of the office, the appellant was holding and therefore, also the prior sanction was not required. The report of the Forensic Science Laboratory proves beyond any reasonable doubt that the appellant has committed the offence.

Now the stage is set to examine the arguments of learned counsel for the parties in detail.

Ex.P11 is the report containing technical opinion of Sh. Vinod Kumar Kamboj, the then Executive Engineer, State Vigilance Bureau (Haryana), Panchkula. It refers to drawing of two samples forwarded to the Director, Forensic Science Laboratory, Haryana, Chandigarh for testing/analysing. Ex.P12 is a paper/ loose sheet on which attendance of various persons present is recorded. It at the most proves that on 30.06.2010 persons who had signed were present. Similarly Ex.P13 is also a loose piece of paper/sheet recording attendance of persons present at the time of the inspection/assessment/sampling on 17.08.2010 duly signed by Babli Devi also along with others.

However, the memo(s), through which the alleged samples were drawn, have not been produced. The aforesaid memo(s) would have thrown as to whether the appellant was present at the time of drawing of sample or not. The aforesaid memo(s) would have also thrown light on how and in what manner the alleged sample of cement mortar was drawn from the retaining wall of the pond. It is also not clear how the contents of sample, alleged to have been drawn, were secured from subsequent interpolation. What was the kind of seal used for securing its contents. Still further it is also not clear, in the absence of relevant documents, how the aforesaid samples were kept in safe custody. There is no evidence that the aforesaid alleged sample of cement mortar was ever deposited with the Incharge of the store of the police station. It is also not the case of the Investigating Officer that the aforesaid sample was kept by him in his safe custody.

On careful perusal of Ex.P14, the report of the Forensic Science

Laboratory, proves that the sample was received through forwarding memo No. SPL-17/SVP(H) dated 17.08.2010 having RC No. 131 dated 26.08.2010 through Constable Nirmal Singh-427/YNR. Neither aforesaid memo No. SPL-17/SVP(H) dated 17.08.2010 nor RC No. 131 dated 26.08.2010 have been produced. Even Constable Nirmal Singh-427/YNR has not been examined by the prosecution. As per forwarding note of Ex.P14, it is apparent that the seals were found intact and matched/tallied with the specimen seal. However, the specimen seal has also not been produced. Sh.Vinod Kumar Kamboj (PW.10), who is alleged to have drawn the sample, has not stated the manner in which the sample was drawn and how it was sealed. Still further, report of the Forensic Science Laboratory (Ex.P14) shows that the remnants of exhibits were returned in one sealed parcel with seals of SSO/PHYFSL(H). However, even this sealed parcel received from the Laboratory has also not been produced.

It is also not clear that where the sample was kept for a period of 10 days. The sample was dispatched to the Forensic Science Laboratory on 26.08.2010. As per Ex.P13, the sample, if any, was alleged to have been drawn on 17.08.2010. There is no explanation as to where the alleged samples were kept for a period of ten days.

Thus, it is apparent that the Prosecuting Agency has failed to produced the link evidence to connect the sample analysed by the Forensic Science Laboratory with the alleged samples so drawn by Sh. Vinod Kumar Kamboj. The procedure followed at the time of drawing of alleged sample is also not clear. In the absence of various memos like the memo prepared at time sample was drawn and its packing and sealing, the memo drawn at the

time when the sealed sample was handed over to the Investigating Officer or Store Incharge, the memo prepared when the sealed sample was taken out of the store and handed over to Constable Nirmal Singh along with his report accompanies by the receipt of deposit of sample with the Forensic Science Laboratory, it is proved that the prosecuting agency has failed to connect the sample drawn, if any, with report of the Laboratory. Thus, the entire link evidence has not been produced by the prosecuting agency. Hence, this Court is of the considered view that the prosecution has failed to produce the material evidence.

Still further, reading of the statement of PW.10 makes an interested reading. He states that he has no record in writing as to how he assessed the alleged development work carried out at village Adhon. He claims that the record was handed over to the Investigating Officer. He never cross checked the same with the record of the Sarpanch. He had only seen the record of the construction of wall in possession of the Investigating Officer.

Still further, the statement of Inspector Raj Pal, PW.22, also makes an interested reading. He stated that the inquiry was conducted on the basis of two complaints moved by Sat Parkash and Gian Chand, respectively, however, the aforesaid complaints are not available on judicial file. The statements of Sat Parkash and Gian Chand were recorded by him but those are not available on the judicial record. He further states that he had recorded the statements of 70/80 people during the inquiry, however, those are also not part of the record. He also admitted that copy of the order of the officer, who ordered the inquiry, is also not a part of the file. He

further states that on every visit to the village, he recorded the statements of the villagers, but those are not part of the judicial file. He further goes on to say that at the time of taking of sample of the material of the retaining wall, the representative of the Sarpanch was present and the signatures of the representative were obtained on the sample, but such record is not available on the judicial file.

There is another aspect which needs certain observation. Appellant has been convicted under Section 13(1)(c) of the 1988 Act which reads as under:

“13. Criminal misconduct by a public servant

- (1) A public servant is said to commit the offence of criminal misconduct,-
- (a) XXXX XXXX XXXX XXX XXXX
- (b) XXXX XXXX XXXX XXX XXXX
- (c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do.”

It is significant to note that the Prevention of Corruption Act, 1988 has been amended by an Act No. 16 of 2018 w.e.f. 26.07.2018. Clause (c) is same as clause (a) of the amended act. Clause (c) as it existed at the relevant time, requires the prosecution to prove that the person accused has dishonestly or fraudulently misappropriated or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person to do so. On dissection of the aforesaid

provision, it is apparent that before a person can be convicted under Section 13(1)(c) of the 1988 Act, it must be established that a property entrusted to him or under his control has been dishonestly or fraudulently misappropriated or otherwise converts for his own use or allows any other person to do so. Once the aforesaid provision is applied to the facts of the case, this Court is of the considered view that the case under under Section 13(1)(c) is not made out against the appellant. The appellant, at the relevant time, was holding the office of Sarpanch of the Gram Panchayat. The Gram Panchayat received certain amount for carrying development work including construction of retaining wall of the pond situated in the village. The construction of the retaining wall was carried out under the supervision of the Junior Engineer. The construction work would have been carried out by a building contractor. The allegations against the appellant, which although are not proved, are that during the construction work, the required ratio of cement was not used in the cement mortar while constructing retaining wall. The Sarpanch cannot be expected to use the cement mortar itself. Such work would be required to be carried out either by the mason or the labourers or at the most on the instructions of the contractor. Before an accused is convicted of having committed a criminal offence, the prosecution is required to prove its case beyond a reasonable doubt. In the facts of the case, the prosecution was required to prove that it was in the knowledge of the Sarpanch or she as instrumental is deficient us of cement in the cement mortar or the cement bags had been dishonestly misappropriated by the Sarpanch or someone else within her knowledge. In the absence of such evidence, it was not appropriate for the Court below to presume that the bags of cement have

been misappropriated by the Sarpanch. It is well settled that suspicion can never take the place of legal proof. In the considered view of this Court, even presumption under Section 20 of the 1988 Act, cannot be extended in facts of the present case.

Last argument of learned counsel is with regard to the lack of sanction of the competent authority before prosecuting the appellant. This argument of learned counsel for appellant is liable to be rejected on three grounds. The appellant was occupying the office of Sarpanch from the year 2005 to 2010. The cognizance was taken by the Trial Court on 10.4.2018, when the charges were framed. The appellant was not holding the post of Sarpanch on that day and therefore, there was no requirement of sanction. Still further, as per Section 19 of the Act, the judgement of conviction and order of sentence shall not be reversed by a Court of Appeal unless the Appellate Court forms an opinion that lack of sanction has resulted in a failure of justice. In the present case, the learned counsel for the appellant has failed to show any prejudice caused to the appellant. Still further, the learned counsel for the appellant has failed to draw attention of the Court, although called upon, whether that at any stage before the trial Court, the appellant or her counsel objected to the continuation of the prosecution in the absence of sanction of the competent authority to prosecute the appellant. Reference in this regard can be made to a larger bench judgement in *Station House Officer, CBI/ACB/Bangalore v. B.A. Srinivasan and Others* (2020) 2 SCC 153, wherein the Hon'ble Supreme Court approved the judgement passed in *Parkash Singh Badal and Another v. State of Punjab and Others* 2007 (1) SCC 1.

In view of the aforesaid evidence, this Court is of the considered view that the prosecution has failed to produce the material evidence so as to establish its case beyond the shadow of reasonable doubt against the appellant. Therefore, the appellant is entitled to benefit of doubt. Hence, the appeal is allowed. The judgement of conviction and order of sentence, passed by the learned Additional sessions Judge, dated 14.02.2020 is set aside. The appellant be released, if not required, in any other case.

(Anil Kshetarpal)
Judge

June 23, 2020
“DK”

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No