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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.549 OF 2019

Mr. Yemmiganur Shiva Reddy
Age: 51 years; Occ: Service
R/a: Flat No.604, Geeta Tower,
Evershine City, Vasai (East),
Taluka Vasai, District Palghar. ….Petitioner

Versus

State of Maharashtra
(Through Anti-Corruption Bureau) ….Respondents

Mr Ashok Mundargi, Senior Advocate a/w Advocate Pravada Raut, i/b Advocate Jayant Bardeskar *for the Petitioner.*

Mr S.R. Agarkar, Additional Public Prosecutor *for the Respondent.*

CORAM : BHARATI H. DANGRE, J.

Reserved on : 4th MAY, 2023
Pronounced on : 6th JUNE 2023

JUDGMENT :

1. The present Revision Application is filed by the applicant assailing the order passed by the Sessions Judge, Thane in ACB Case No.2/2017, which has refused to discharge him from the

ACB Case No.2/2017 registered against him by invoking Section 12 of the Prevention of Corruption Act, 1988.

2. Heard learned Senior Counsel Mr Ashok Mundargi along with Advocate Pravada Raut for the applicant. The learned Additional Public Prosecutor Mr S.R. Agarkar has opposed the application in the presence of Mrs. Ashwini Patil, Deputy Superintendent of Police, ACB, Thane.

3. The applicant was arraigned as an accused in connection with FIR bearing no.II-54/2016 registered with Kasarvadavali Police Station on 29.04.2016, at the instance of one Mr Dhananjay Gawade (the informant).

The informant approached the S.P. (ACB) on 16.04.2016 with a complaint disclosing that he was an elected corporator of Shivsena from Vasai Virar Municipal Corporation since 2015 and in the corporation region, the accused (the applicant) was working as Deputy Director of Town Planning. He alleged that in the said capacity, he has issued commencement certificates to various illegal constructions as well as to the builders and this has constrained him, as a public representative, to file various complaints in Tulinj, Nalasopara and Virar Police Station. He also instituted several petitions in the High Court against the Vasai Virar Municipal Corporation.

He alleged that on 13.04.2016, he was called by the applicant to a location on Ghodbunder road and was offered a bribe amount of ₹1.00 crore, so that the complainant shall not file any further complaint against him. It was alleged that the applicant tried to pay a part of the bribe amount of ₹10.00 lakhs on the spot to him but he refused to accept the same and, therefore, he lodged the complaint with ACB, Thane.

4. On the complaint being received, in order to verify its authenticity, on 26.04.2016 a meeting was once again arranged and the conversation between the two was recorded with the aid of the voice recorder and the verification was carried out. It is alleged that the conversation had surfaced or received, to the effect that on the earlier occasion, the applicant had offered to pay ₹10.00 lakhs and subsequently, he offered to pay a sum of ₹25.00 lakhs and at the time of verification on 26.04.2016, the applicant told the complainant that he should not be personally targetted and he should not take a follow up of the complains filed with the police and he offered a sum of ₹10.00 lakhs. When he refused to accept the amount it was hiked to ₹25.00 lakhs and this too was recorded in the voice recorder.

5. It is further alleged that as decided in the verification panchanama when the Investigating Officer and the pancha witnesses were present in the office of ACB, Thane, the applicant made a phone call to the complainant on his mobile and disclosed to him that he is leaving his office and was coming to 'Hotel Wine and Dine'. It is further alleged that the trap was laid and as soon as the complainant took out an amount of ₹25.00 lakhs from the rexin bag, which he was holding, the complainant signalled the raiding party and the applicant was apprehended.

On completion of the investigation, a charge sheet was filed and the offence under Section 12 of the Prevention of Corruption Act was invoked.

6. The learned Senior Counsel Mr Mundargi would submit that the applicant was working as the Deputy Director of the Town Planning Department and was placed on deputation in Vasai Virar Municipal Corporation. As against this, the complainant is a Corporator of Vasai Virar Municipal Corporation from ward no.63 and he had filed various complaints alleging wrongful issuance of commencement certificates and permissions which had encouraged illegal constructions and it was alleged by him that the applicant in his capacity as Deputy Director of Town Planning had granted such permissions illegally and malafidely.

Mr Mundargi would submit that even if the complaint is taken as it is, it is in respect of the commencement certificates, irregularities in incentive FSI, etc. and pertain to the Town Planning Office. Being a Corporator, the informant is not at all concerned with the Town Planning Office and, therefore, any order passed by the Town Planning Department or anything concerned with the same, does not fall within the purview of the official capacity of the applicant. He would submit that to attribute an offence punishable under Sections 7 and 11 of the Prevention of Corruption Act, the most necessary ingredient, being an acceptance or obtaining or agreeing to accept or an attempt to obtain from any person, for himself or for any other person any gratification whatever, other than legal remuneration as a motive or reward for doing or forbearing to do something which is a part of the official duty/capacity of a public servant.

The submission advanced is, in none of the complaints filed by the informant, the allegations are to the effect that it was a task which was to be discharged within the official duty of the informant as a Corporator and, therefore, the provisions of Section 7 and 11 are not at all attributed so as to attract the offence under Section 12 of the Prevention of Corruption Act.

7. Admittedly, the applicant is working as a public servant whereas the informant is a Corporator and when the complaints filed by him are perused, he alleged that he was offered a bribe by the applicant, a public servant. The incident is alleged to have taken place in the year 2016 and the charge sheet filed by the ACB dated 16.01.2017 invokes Section 12 of the Prevention of the Corruption Act in respect of the offence registered on 29.04.2016. The charge sheet accused the applicant, a public servant, of offering a bribe of ₹1.00 crore to the complainant and in furtherance of the said offer an attempt being made to make a part payment of ₹10.00 lakhs on 13.04.2016. Since there was reluctance on the part of the informant to accept the said amount he lodged the complaint and after verification of the same, it is alleged that on 26.04.2016 an attempt was made to offer the bribe amount of ₹10.00 lakhs for not persuading the complaints filed by the complainant in the capacity as Corporator. But when there was a refusal to accept the amount of ₹10.00 lakhs, a sum of ₹25.00 lakhs was offered. The charge sheet further alleged that on the trap being laid, the applicant came to be apprehended while offering a sum of ₹25.00 lakhs.

In the background of the aforesaid accusation what has been invoked is Section 12 of the Prevention of Corruption Act exclusively.

8. The moot question that arises for consideration is whether Section 12 of the Prevention of Corruption Act is attracted in the circumstances highlighted in the charge sheet filed by the ACB.

9. Section 12 of the Prevention of Corruption Act prior to its amendment Act No.16 of 2018 which came into effect from 26.07.2018 reads as under:

> *"12. **Punishment for abetment of offences defined in section 7 or 11** – Whoever abets any offence punishable under section 7 or section 11 whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than [three years] but which may extend to [seven years] and shall also be liable to fine."*

10. Upon the amendment being effected in Section 12, it reads as under:

> *"12. **Punishment for abetment of offences** – Whoever abets any offence punishable under this Act, whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than three years, but which may extend to seven years and shall also be liable to fine."*

11. In the present case, the unamended Section 12 is not attracted since the FIR is lodged on 29.04.2016. Section 12 as existed at the relevant time clearly postulated the abetment of an offence punishable under Section 7 or Section 11, whether or not that offence is committed in consequence of that abetment.

The existing provision clearly contemplated abetment of an offence only punishable under Section 7 or Section 11 in contrast to the amended Section which clearly contemplates abetment of any offence punishable under the Prevention of Corruption Act.

12. Section 7, which existed prior to its substitution by Act no.16 of 2018 contemplated an act of a public servant taking gratification other than legal remuneration in respect of an official act. It clearly postulated an act of a public servant or of a person expecting to be a public servant, of accepting or obtaining or agreeing to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of Section 2, or with any public servant, whether named or otherwise. Such an act was punishable with imprisonment which shall be not less than [three years] but which may extend to [seven years] and it is also liable to fine.

Section 7 of Prevention of Corruption Act, therefore, clearly contemplated an act of accepting of any gratification, other than legal remuneration, as a motive or reward for doing of an official act or a scene of favour or disfavour in exercise of the official functions.

The gist of existing Section 7 is thus acceptance of gratification other than legal remuneration in respect of an official Act.

13. The aforesaid Section 7, as it existed then, made an act of accepting or attempting to accept any amount by a public servant for doing an act or forbearing for doing, for performing an official act or forbearing to do an act which was within his capacity to be performed in lieu of acceptance of the bribe amount.

14. Applying the aforesaid provision to the present case, the allegation faced by the applicant is that he offered an amount to the complainant, in his capacity as a public servant but there is no accusation that the amount offered was for the purpose of asking him to do something or from forbearing to do an act which he was capable of performing or discharging as a public servant.

An act of a public servant taking gratification was only made punishable after the provision was amended in the year 2018 where an act of offering a bribe to a public servant is also made punishable, as it now contemplates and covers an act of obtaining or accepting or attempting to obtain undue advantage from any person as a reward from the improper or dishonest performance of a public duty or forbearing such duty either by himself or any public servant or indulging any public servant to perform dishonestly a public duty or to forebear the performance of such duty in anticipation or in consequence of accepting undue advantage of any person.

15. In any case, this provision contemplate discharge of the duty which was expected to be discharged or forbearing to discharge such a duty of a public servant. In any case, prior to 2018, the act of offering a bribe was not punishable. In any case, there is no material to show that in an official capacity as a Corporator, he was expected to lodge a complaint and the amount of bribe was being offered by the applicant to forebear him from lodging such a complaint.

16. The essence or the necessary ingredient of the demand of the amount by public servant is conspicuously absent in the charge sheet. As far as Section 11 is concerned, it contemplates a public servant obtaining undue advantage, without consideration from the person concerned in proceeding or business transacted by such public servant, Section 11 is also not attracted in the present scenario. Section 11 necessarily require a public servant to accept or obtain any undue advantage without consideration or for a consideration which he knows to be inadequate or from any person whom he has been or likely to be concerned in any proceedings or business transacted or to be transacted by such public servant, in connection with the official function or public duty of himself or of any public servant to whom he is subordinate. Since the charge sheet does not make out either the case under Section 7 or Section 11 of the Prevention of Corruption Act, mere invocation of Section 12, by itself cannot sustain as at the relevant time Section 12 punished an act of abetment, defined in Section 7 or Section 11.

17. The learned Senior Counsel Mr. Mundargi is perfectly justified in placing reliance upon the decision of the Division Bench revolving around Section 12 of the Prevention of Corruption Act, as pronounced in the case of ***Kishore Khanchand Wadhwani V/s. State of Maharashtra***[1] to which I am a party (Justice Bharati H. Dangre) wherein it is held as under:

> *"16. Section 12 of the PC Act sets out the penalty for abetment of an offence punishable under Section 7 or 11, whether or not that offence is committed in consequence of that abetment. The PC Act, 1988 does not define as to what the term "abetment" means and conveys for the*

1 2019 SCC OnLine Bom 13130

purpose of Section 12 of the PC Act. Therefore, we will have to fall back to Section 107 of the IPC. Perusal of Section 107 of the IPC would reveal that to constitute abatement of an offence there must be some instigation to do an act, which would amount to an offence, or the alleged abettor must have intentionally aided or facilitated the commission of a crime, or the alleged abettor must have engaged in some conspiracy with one or more other person or persons for the commission of an offence. It thus contemplates existence of some nexus between the acts of the alleged abettor and the act of offence abetted. Prior to the amendment of 2018, the mere offer of bribe was not constituting an offence and the offence relating to public servants being bribed and offence relating to offering of bribe to public servant came to be introduced on 26/07/2018. Prior to substitution of Sections 7, 8, 9 and 10, what was punishable was an act of public servant accepting gratification other than legal remuneration in respect of an official act. The payment of bribe would be covered under Section 12 of the PC Act if such payment of illegal gratification was made as motive or reward as referred to in Section 7 of the PC Act. The act of offering a bribe to a public servant became an offence only with effect from 26/07/2018 and commensurating with the introduction of the said provision, Section 12 of the Act is also amended and by the amended provision whoever abets any offence punishable under the Act, whether or not that offence is committed in consequence of that abetment, shall be liable for punishment for abetment of offence. The public servant, who accepts the bribe was liable for penalty under Section 7 of the PC Act but now any person who gives or promises to give an undue advantage to another person or persons, with intention to induce a public servant to perform improperly a public duty; or to reward such public servant for the improper performance of public duty is liable for penalty under Section 8 of the PC Act. The act of mere offer voluntarily made by the petitioners without any demand from the complainant cannot be made punishable under Section 12 of the PC Act since the said act was not attracting any

> *offence prior to 26/07/2018 even though the amount has been found on the table of the complainant in the trap laid."*

18. In the wake of the factual and legal scenario emerging from the above discussion, the impugned order which failed to consider the said aspect cannot be sustained. The applicant cannot be asked to undergo the rigmarole of the trial when its end result is predictable as there can be no conviction of the applicant under Section 12 of the Prevention of Corruption Act in the background of facts and circumstances mentioned in the charge sheet.

19. As a result of the aforesaid discussion, the impugned order is quashed and set aside. The Criminal Revision Application deserves to be allowed by discharging the applicant from ACB Case No.2/2017 which charged him for an offence punishable under Section 12 of the Prevention of Corruption Act.

20. Revision application is allowed in the aforesaid terms.

(BHARATI DANGRE, J.)