2024:BHC-AUG:15975

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.707 OF 2003

. Santosh S/o Balwantrao Ghorpade,
Age: 47 Years, Occ.: Service,
R/o. Khultabad, District: Aurangabad **.. Appellant**

Versus

. The State of Maharashtra **.. Respondent**

…
Advocate for Appellant:
Mr. Rajendrraa S. Deshmukkh, Senior Advocate i/b Mr. Devang R. Deshmukh
APP for Respondent/State: Mrs. Chaitali Choudhari-Kutti
…

CORAM	:	**ABHAY S. WAGHWASE, J.**
Reserved On	:	**18.07.2024**
Pronounced on	:	**30.07.2024**

JUDGMENT:

1. In this appeal there is challenge to judgment and order of conviction recorded by Special Judge in Special Case No.23 of 1998 vide judgment and order dated 30.09.2003, convicting the appellant for offence under Sections 7, 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 *(PC Act)*.

FACTS LEADING TO TRIAL

2. In brief prosecution case in trial court is as under.

Complainant Nawnath had approached accused Talathi for carrying out mutation entry in the backdrop of sale deed. Accused demanded Rs.500/- to do the needful. When complainant expressed his inability to pay said amount, demand was brought down to Rs.300/- and out of which Rs.100/- was paid, remaining was to be paid on the next day. But the complainant was not willing to pay bribe. He lodged report Exhibit-18, on the basis of which ACB authorities planned and arranged trap, summoned panchas, appraised about demand, introduced them to complainant, necessary instructions of raid and trap were explained. Complainant and panch approached accused in office. There accused demanded amount. Said demand was complied and accused accepted the tainted currency. After which, necessary signal was relayed and raiding party apprehended accused. Further procedure and formalities were conducted and complaint was lodged by ACB officer. After investigation, he was charge-sheeted. Necessary sanction was obtained and, thereafter, accused was charge-sheeted and tried by the Special Judge, who accepted the case of prosecution and recorded conviction vide judgment dated 30.09.2003 and the same is now taken exception by filing instant appeal.

SUBMISSIONS

On behalf of the Appellant:

3. Learned Senior Advocate submitted that there is apparently false implication. According to learned Senior Advocate, here, prosecution has even failed to prove commission of offence beyond

reasonable doubt. He submitted that accused / appellant does not deny acceptance of amount but he strenuously emphasized that amount was not towards bribe, rather it was contribution towards small savings, which was a special drive in force at that time. That, prosecution witnesses admitted about such drive and amount demanded towards the same. However, there is false implication alleging demand of illegal gratification.

Learned counsel took this court through the testimony of PW-1 / Sanctioning Authority and, moreover, to the cross and would submit that this witness was not competent or authorized to accord sanction because appointing authority was Collector. He being Sub-Divisional Officer and sub-ordinate officer was not competent to accord sanction and, therefore, sanction itself being invalid, there is serious dent to the prosecution case.

He next took this court through the evidence of PW-2 / Nawnath - complainant and submitted that there is no sufficient corroboration to his version. He then took this court through the cross of complainant and would submit that prior to the alleged payment, complainant and accused had met at hotel and it is admitted by complainant himself. That, had it been an illegal gratification or bribe then, same transaction of give and take would have taken in the very hotel itself. That, it did not so happen. Rather, complainant was taken to the office by the accused and there amount was accepted, but it was towards contribution for small savings and not in return of any official work.

That, there was clear suggestion in this direction to the complainant in his cross, para 10, though it is denied. Thus, learned Senior Advocate submitted that specific defence of accused is that, amount was accepted towards small savings contribution. This specific and definite stand that has been taken since beginning. Even, in the statement accused has clarified his said stand.

Learned Senior Advocate also pointed out that before certificate could be issued after taking money, hurriedly signal has been given by complainant without waiting for preparation of certificate and, immediately thereafter, trap is shown to be successful.

4. At this juncture, learned Senior Advocate further took this court through the testimony of PW-4, who was a Kotwal, more particularly, para 3, and pointed out that he had admitted that at that point of time drive for small savings was going on. As such, learned Senior Advocate submitted that defence of the accused has been probabilized and, as such, available presumption under Section 20 of the Act is sufficiently discharged.

5. According to learned Senior Advocate, in the case in hand, there was no verification of Panchas, which is essential and is insisted by the Hon'ble Apex Court recently.

According to learned Senior Advocate, all above aspects are not appreciated by learned trial judge and has recorded erroneous findings and conclusion and, hence, he prays to allow the appeal by setting aside the impugned judgment.

6. Learned Senior Advocate strenuously submitted that in this case severe prejudice has been caused to the accused as no questions under Section 313 of Code of Criminal Procedure, 1973 on the point of sanction are posed. Therefore, serious prejudice has been caused to the accused and for the same reason, trial itself has got vitiated and he seeks benefit of the same.

7. He seeks reliance on judgments of the Apex Court in the case of **Mir Mustafa Ali Hasmi Vs. State of Andhra Pradesh, 2024 INSC 503** and on the point of Section 313 of Code of Criminal Procedure in the case of **Kamalabai Haribhau Lastane Vs. State of Maharashtra, [2019(5) Mh.L.J. (Cri.) 360]**.

On behalf of the State:

8. In answer to above, learned APP pointed out that prosecution had proved it’s case beyond reasonable doubt. For carrying out mutation entry accused Talathi has demanded Rs.500/-, when complainant expressed his inability to pay such amount, accused brought down the amount to Rs.300/- and even accepted part amount i.e. Rs.100/- He called complainant next day with remaining Rs.200/-.

Complaint was lodged, trap was planned, Panch and complainant both; who were explained with the procedure and they approached accused, he demanded and accepted the bribe, tainted currency was found in his possession. At the time of making raid it was illegal gratification, proper sanction has been accorded by authority. Learned trial court has rightly considered and appreciated the evidence of prosecution witnesses, which had remained undisturbed and unshaken and, as such, according to her, there is no need to interfere.

STATUS

9. Status of the prosecution witnesses is as under:

PW-1 Sanctioning Authority

PW-2 Complainant

PW-3 Shadow Panch

PW-4 Kotwal

PW-5 Investigating Officer

ANALYSIS

10. The sum and substance of the accusation against appellant is that while he was working as a Talathi, when complainant approached

him for carrying out mutation entry on the basis of Sale Deed, bribe was demanded, part bribe was already accepted and on the day of trap while complainant was accompanied by Panch, remaining bribe demand was raised, it was accepted and, therefore, he was apprehended.

11. The fundamental grounds of challenge raised in appeal by the learned Senior Advocate is that factum of very verification of demand has not been got confirmed by the Investigating Officer. Second ground of challenge is that entire incriminating material as has emerged from prosecution evidence, has not been put to accused i.e. more particularly evidence of Sanctioning Authority and, therefore, serious prejudice has been caused thereby vitiating the entire trial. In support of such contention he relied on judgment of ***Kamlabai*** *(supra)*.

12. Before proceeding to answer above grounds of challenge it would be profitable to first ascertain, whether required ingredients for attracting charge under Section 7, 13(1)(d) read with Section 13(2) of the PC Act are fully established in the case in hand. Admittedly, case of prosecution is rested on the evidence of as many as 5 witnesses. Crucial evidence, considering the nature of accusation is that of complainant, shadow panch and, it is therefore, from their testimony examination and analysis, as to whether there was demand of illegal gratification and it was further accepted.

Evidence of PW-2 is at Exhibit 13. In his substantive evidence he stated that after tendering application along with copy of the Sale Deed he requested accused to carry out necessary entry in the 7/12 extract and for doing the same, it is his version that initially there was demand of Rs.500/- but finally the figure was brought down to Rs.300/- and on same day Rs.100/- was paid and before paying remaining Rs.200/- which he was not willing to pay he lodged report with ACB authorities i.e. Exhibit 18. Then, in para 4 and 7 he has testified about panch being called, both being introduced to each other, ACB authorities explaining them procedure of trap, handing over tainted currency etc. In para 8 of his chief he stated that when they approached Tahsil office accused was available at the gates. Thereafter, they all went to have tea and then accused asked him, whether he has brought previous 7/12 extract, two blank 7/12 extract forms and the amount told to him. Then they entered the Tahsil office. There he stated that accused called one person directing him to fill the form, prepare 7/12 extract and while said person was following said directions by sitting next to the accused, accused made demand of Rs.200/- as decided. Informant claims that he demanded 7/12 extract first but accused insisted payment of Rs.200/- first and, therefore, amount was removed from the pocket and handed over to accused who accepted it and, thereafter, he gave necessary signal.

On visiting his cross, which comprises of para 9 and 10, it is evident that except suggestion that complainant was annoyed for making demand, rest all suggestions of accused in meeting in Tahsil office are denied. Even suggestion of contribution towards small savings has been flatly denied, which is the thrust in the appeal, that, amount demanded and accepted was not a bribe but towards small savings.

13. Even on visiting testimony of PW-3 Panch, he too is found to be deposing about being called at ACB office on 01.10.1997, introduced to complainant about his complaint, going through the complaint, panchanama Exhibit 29 to be drawn, again called at ACB office on 03.10.1997, procedure of application of anthracene powder to the currency and demonstration being given and even panchanama to that effect Exhibit 30 being drawn. In para 4, he deposed that he accompanied complainant to Tahsil office. They met accused, went to hotel, had tea. Even this witness stated that at the time of taking tea accused asked complainant whether he has brought old as well as new and blank 7/12 extract, accused handed the same to unknown person with direction to fill it. Panch witness stated that accused asked complainant whether amount as agreed has been brought. Even he coroborates and consistently states as like complainant that complainant demanded 7/12 extract first but accused insisted payment of Rs.200/-, upon which

complainant took out tainted currency, held it before the accused, who collected it in his right hand and pocketed the amount and this was followed by giving signal by complainant.

His cross is in para 6, 7 and 8. The above discussed testimony of panch witness has not been rendered doubtful or shaken.

Consequently, on carefully going through the testimonies of complainant and panch witness, PW-2 and PW-3 respectively, prosecution version has remained virtually unchallenged.

14. Learned Senior Advocate would strenuously and fervently submitted that, here, defence of accused is that he did accepted the amount from complainant but the same was not a bribe or an illegal gratification, rather it was contribution towards small savings. In support of such contention and submission learned Senior Advocate pointed out evidence of PW-4 Kotwal and would submit that this prosecution witness himself has admitted about drive of small savings in progress and, therefore, amount accepted was towards the same and not towards illegal gratification.

This court does not find any force in above submission for the simple reason that except making the suggestion that amount demanded was towards small savings, there is no further distinct evidence on this count. Beyond putting suggestion there is no other supportive material. An attempt has also been made to show that complainant did not wait till issuance of certificate and hurriedly gave signal, just to see that the trap is successful. There is no force in above submission also. Testimony of complainant about he approaching for 7/12 extract along with application and Sale Deed has not been refuted. Even when the said requirements, which were lawful duties were not done, complainant seems to have approached accused for second time and at that time also demand was made. Complainant does not state that he was asked also to contribute money towards small savings. Mere special drive for small savings in force, at that relevant time would not come to the rescue of accused because even immediately after trap, he has not tendered written statement taking above defence.

Therefore, the above stand of amount being accepted towards small savings, is apparently afterthought version and cannot be straight away relied and accepted.

Here, there is both demand as well as acceptance. Panch accompanied accused has fully supported complainant on the point of events that took place in the Tahsil office that day. Moreover, it is also noticed that the so called unknown person, who according to complainant / PW2 and panch / PW-3 was directed by accused to fill-up the form and details in 7/12 extract has been examined by prosecution as PW-4. He is Kotwal and thus an official apparently subordinate to Talathi.

In his evidence, at exhibit 37, he has stated that on 03.10.1997, when he was in the Tahsil office, accused called him, directed him to prepare 7/12 extract on the basis of old 7/12 extract, he gave name of complainant and further stated that complainant gave Rs.200/- to the accused, who kept it in the pocket. He is supporting version of both complainant and shadow panch. He also answered in cross that he had told police that, accused told complainant to pay Rs.200/- as agreed. There is no evidence that it was also agreed that at the time of seeking 7/12 extract, contribution towards small savings were to be made.

On complete survey of testimony of PW-2, PW-3 and PW-4, here, prosecution seems to have cogently established both demand as well as acceptance of bribe.

15. As regards to objection of learned Senior Advocate that, here, not confronting evidence of PW-1 / Sanctioning Authority under Section 313 of Code of Criminal Procedure, serious prejudice has been caused, also this court finds no force or substance in the same, for the simple reason that immediately at the time of conclusion of record in Section 313 Code of Criminal Procedure, no objection of not putting questions pertaining to evidence of PW-1 were raised at that point of time. In the Judgment, learned trial judge, while assigning reasons, in para 9, 10 and 11, has devoted discussion touching the aspect of

sanctioning authority PW-1. In para 10, learned trial court has named defence counsel and further observed that defence has not challenged either validity or legality of the sanction order on any count but merely placed reliance on the citations on the point of sanctioning authority. Therefore, at the earliest point of time in spite of opportunity, there was no explanation to the aspect of validity of sanction. Further, in the considered opinion of this court, sanction part is an administrative act. What is incriminating evidence is the evidence of complainant, panch and Investigating Officer. That, incriminating material is already brought to the notice of appellant and he has been offered an opportunity to answer the same. What Section 313 of the Code of Criminal Procedure requires is affording of an opportunity to accused to answer only incriminating material by way of evidence coming against him. Resultantly, fair opportunity and fair trial has been already extended to the accused at the trial stage. Here, non examination of accused on the point of administrative sanction, entire case of prosecution cannot be thrown out or brushed aside. Furthermore, what prejudice exactly has been caused to the accused by not affording him an opportunity to answer evidence of superior administrative officer, which is post commission of offence by way of an administrative formality has not been demonstrated or substantiated so as to render the entire trial vitiated.

16. It would be profitable at this juncture to refer to the judgment of the Hon'ble Apex Court in the case of **<u>Nar Singh Vs. State of Haryana; (2015) 1 SCC 496</u>**, wherein scope, object and importance of Section 313 of the Code of Criminal Procedure are elucidated and, further, law has been dealt regarding situation, wherein there is non compliance of mandatory provision and where omission to put material circumstances, *ipso facto* vitiates trial. The relevant observations are as under:

> *"(Paras 16 to 19)*
> *Held:*
> ***Insofar as non-compliance with mandatory provisions of Section 313 CrPC is concerned, it is an error essentially committed by the learned Sessions Judge. Since justice suffers in the hands of the court, the same has to be corrected or rectified in the appeal. If an objection as to Section 313 CrPC statement is taken at the earliest stage, the court can make good the defect and record additional statement of the accused as that would be in the interest of all. When objections as to defective Section 313 CrPC statement are raised in the appellate court, then difficulties arise for the prosecution as well as the accused. When the trial court is required to act in accordance with the mandatory provisions of Section 313 CrPC, failure on the part of the trial court to comply with the mandate of the law, cannot automatically enure to the benefit of the accused. Undoubtedly, the attention of the accused must specifically be brought to inculpable pieces of evidence to give him an opportunity to offer an explanation, if he chooses to do so. The omission on the part of the court to question the accused on any incriminating circumstance would not ipso facto vitiate the trial. The accused must show prejudice and that miscarriage of justice had been sustained by him."***
>
> *"(Paras 20 to 22)*
> *Held:*

The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance with Section 313 CrPC has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under Section 313 CrPC, it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that the accused has suffered some disability or detriment in relation to the safeguard given to him under Section 313 CrPC. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the court may draw an inference of such prejudice. The facts of each case have to bed examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused."

17. Resultantly, in the light of above discussion, here, there is no merit in the appeal. Testimony of complainant is finding support from independent panch witness. The demand and acceptance has been proved beyond reasonable doubt. Sanction accorded is on application of mind. Consequently, there is no infirmity in the same. No good ground being made out in the appeal, the same deserves to be dismissed.

ORDER

Criminal Appeal No.707 of 2003 stands dismissed.

[ABHAY S. WAGHWASE, J.]

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