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Vijayan vs State of Kerala

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Court : Kerala

Decided On : Jul-31-2023

Judge : Honourable Dr. Justice Kauser Edappagath

Appeal No. : CRL.A/2239/2009

Appellant : Vijayan

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH MONDAY, THE 31ST DAY OF JULY 2023 / 9TH SRAVANA, 1945 CRL.A NO. 2239 OF 2009 AGAINST THE ORDER/JUDGMENT IN CC NO.10/2005 OF ENQUIRY COMMISSIONER & SPECIAL JUDGE, THIRUVANANTHAPURAM APPELLANT/2nd ACCUSED: VIJAYAN FORMERLY SECRETARY, THODIYOOR GRAMA PANCHAYAT. BY ADVS. SRI.SHABU SREEDHARAN SRI.N.A.JOHN JACOB SRI.C.K.PRASAD RESPONDENT/COMPLAINANT: STATE OF KERALA REPRESENTED BY THE DY.SP., VACB KOLLAM UNIT, THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA SRI. A. RAJESH SPL PP, VACB SMT S REKHA SR PP THIS CRIMINAL

APPEAL HAVING COME UP FOR ADMISSION ON 31.07.2023, ALONG WITH CRL.A.No. 2369/2009 and 1620/2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH MONDAY, THE 31ST DAY OF JULY 2023 / 9TH SRAVANA, 1945 CRL.A NO. 2369 OF 2009 AGAINST THE ORDER/JUDGMENT IN CC NO.10/2005 OF ENQUIRY COMMISSIONER & SPECIAL JUDGE, THIRUVANANTHAPURAM

APPELLANT/1st ACCUSED: VASANTHAKUMARY FORMERLY PRESIDENT, THODIYOOR GRAMA PANCHAYATH. BY ADVS. SMT.DAYA K. PANICKER SMT.K.B.ANAMIKA RESPONDENT/ COMPLAINANT: STATE OF KERALA REPRESENTED BY DY.S.P.VACB, THIRUVANANTHAPURAM,, THROUGH PUBLIC PROSECUTOR,HIGH COURT OF KERALA, ERNAKULAM. SRI. A. RAJESH SPL PP, VACB SMT S REKHA SR PP THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 31.07.2023, ALONG WITH CRL.A.1620/2013 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH MONDAY, THE 31ST DAY OF JULY 2023 / 9TH SRAVANA, 1945 CRL.A NO. 1620 OF 2013 AGAINST THE ORDER/JUDGMENT IN CC NO.10/2005 OF ENQUIRY COMMISSIONER & SPECIAL JUDGE, THIRUVANANTHAPURAM

APPELLANT/COMPLAINANT: THE STATE OF KERALA PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY ADV PUBLIC PROSECUTOR RESPONDENT/3rd ACCUSED: SRI. JOHN T.VARGHESE FORMERLY SHOP MANAGER, SINGER CENTRE,

KOLLAM. BY ADV SRI.R.BINDU (SASTHAMANGALAM) SRI. A. RAJESH SPL PP, VACB SMT S REKHA SR PP THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 31.07.2023, ALONG WITH CRL.A.2239/2009, 2369/2009, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 31st day of July, 2023 All these appeals arise out of the judgment passed by the Enquiry Commissioner and Special Judge, Thiruvananthapuram (for short 'the court below') in C.C.No.10/2005 dated 13/10/2009.

2. Altogether there were three accused. The accused No.1 was the President and the accused No.2 was the Secretary of

the Thodiyoor Grama Panchayat. The accused No.3 was the Branch Manager of the Singer India Limited, Kollam Branch. The Panchayat Committee of the Thodiyoor Grama Panchayat decided to purchase 70 sewing machines for distribution among the unemployed women of the Panchayat under the Peoples Plan

Program of Kerala. Accordingly, tenders were invited. It was decided to purchase sewing machines from Singer India Limited. The prosecution allegation is that, the accused Nos. 1 and 2 conspired with the accused No.3 and withdrew an amount of 1,99,500/- from the Panchayat funds as against the actual cost of machine at the rate of 1,32,997/- and obtained pecuniary advantage of 56,503/- causing corresponding loss to the

Panchayat. It is alleged that they also falsified the accounts for the said purpose. The offences alleged are punishable under Sections 13(1) (c) and (d) read with 13(2) of the Prevention of Corruption Act, 1988 (for short 'the PC Act'), Sections 120 B and 477 A of the Indian Penal Code (for short 'the IPC').

3. After trial, the court below found the accused Nos. 1 and 2 guilty under Section 13(1)(c) and (d) read with 13(2) of the PC Act and under Sections 477A and 120B of the IPC and they

were convicted for the said offences. They were sentenced to undergo rigorous imprisonment for a period of one year each and in addition to pay a fine of 10,000/- each, in default to suffer rigorous imprisonment for a period of three months each under Section 13(1)(c) & (d) read with 13 (2) of the PC Act, to undergo rigorous imprisonment for a period of one year each and to pay a fine of 10,000/- each, in default to suffer rigorous imprisonment for a period of three months each under Section 477 A of the IPC and to undergo rigorous imprisonment for a period of one year each and to pay a fine of 10,000/- each, in default to suffer rigorous imprisonment for three months each under Section 120 B of the

IPC. The accused No.3 was found not guilty of the offences

charged against him and he was acquitted. Challenging

No.3, the State preferred Crl.A.No.1620/2013.

4. During the pendency of the appeal, the accused No.3/respondent in Crl.A.No.1620/2013 expired. Hence, Crl.A.No.1620/2013 stands abated.

5. I have heard Smt. Daya K. Panicker, the learned

counsel for the accused No.1, Sri. Shabu Sreedharan, the learned counsel for the accused No.2 and Sri. A. Rajesh, the learned Special Public Prosecutor for VACB.

6. The learned counsel for the accused Nos. 1 and 2

impeached the finding of the court below on appreciation of the evidence and the resultant finding as to the guilt. The learned counsel submitted that the prosecution has miserably failed to prove the entrustment of money with the accused Nos. 1 and 2 and

its misappropriation by them. The counsel also submitted that the evidence of the prosecution witnesses are highly contradictory. The learned counsel for the accused No.2 additionally submitted that the sanction for prosecution has not been properly proved by the prosecution. On the other hand, the learned Special Public Prosecutor for VACB supported the findings and verdict of the court below and submitted that the prosecution has succeeded in proving the case beyond reasonable doubt.

7. The status of the accused during the period of the

alleged incident is not in dispute. According to the prosecution, the alleged entrustment of money and misappropriation took place during March to April, 1998. Admittedly, the accused No.1 was the President and the accused No.2 was the Secretary of the Thodiyoor Grama Panchayat during the said period and hence they were public servants. It is not in dispute that the accused No.3 was the Branch Manager of Singer India limited, Kollam Branch during the said period. It is also not in dispute that the Thodiyoor Grama Panchayat has decided to purchase 70 sewing machines for distribution among the unemployed women of the Panchayat under

the Peoples Plan Program, Kerala. Ext.P16 is the Developmental Strategies (Vikasana thanthram) published with respect to the developmental activities of the Panchayat. In Ext.P16, the amount allotted from the Government to the Panchayat for different developmental activities are separately shown. Ext.P16(a) would show that an amount of 2,10,000/- was received for the purchase of sewing machines to distribute among the unemployed women of the Panchayat. PW5, the LD Clerk of the Panchayat, deposed that the said amount was allotted from the Government to the Panchayat and it was decided to purchase 70 sewing machines using the said amount. So the entrustment of 2,10,000/- to the Panchayat for purchasing 70 sewing machines stands proved. In fact, the said entrustment is not disputed by the accused Nos. 2 and 3. While the accused No.1 contended that the amount was entursted with the accused No.2, the accused No.2 contended that the amount was entrusted with the accused No.1.

8. The learned counsel for the accused No.1 inviting my attention to Section 182 of the Kerala Panchayat Raj Act, 1994 (for short 'the Act') argued that the Secretary of the Panchayat is the

custodian of the Panchayat fund and so there is no entrustment of fund with the accused No.1. Section 182 of the Act deals with the powers and functions of the

Secretary. Sub-section (viii) of Section 182 says that the Secretary, as executive officer of the Panchayat shall be responsible for the safe custody of the Panchayat funds. Sub-section (xviii) of Section 182 of the Act provides that the Secretary shall disburse the plan funds to the officers concerned and to render utilisation certificate to the Government as ordered by it. On the other hand, the learned counsel for the accused No.2 inviting my attention to Section 156 of the Kerala Panchayath Raj Act and he submitted that the President is the over all custodian of the entire activities in the Panchayat including the Panchayat funds and so there is no entrustment of the funds with the Secretary. Section 156 of the Act deals with the functions of the President and Vice President of the Panchayat. Sub-section (1) of Section 156 says that, the executive power for the purpose of carrying out the provisions of this Act and the resolution passed by a Panchayat shall vest in the President. Sub-section 4(b) of Section 156 says that the president shall exercise supervision and control over the

acts done and actions taken by all officers and employees of the Panchayat. Sub-section 4(c) says that the President shall incur contingent expenditure upto such limit as may be fixed by the Government from time to time. Sub-section 4(d) says that the President of the Panchayat shall authorise payment and refunds pertaining to the Panchayat.

9. A conjoint reading of Sections 182 and 156 referred

above would make it clear that the President and the Secretary shall jointly have supervisory control over the affairs of the Panchayat, including Panchayat funds under the over all supervision of the President. Thus as rightly held by the court below, it can safely be concluded that the prosecution has succeeded in proving the entrustment of the amount of 2,10,000/- to purchase the 70 sewing machines with the accused Nos. 1 and 2.

10. Once the entrustment is established by the prosecution,

the burden shifts to the accused to account for the property entrusted. It is settled that if the entrustment is proved and the explanation given by the accused is not satisfactory, then it can be presumed that the accused has committed the offence of criminal misappropriation. The modus operandi of the accused, how he committed the misappropriation etc. need not be proved by the prosecution. The fraudulent intention of the accused can be inferred from the attending circumstances. The same ingredients of misappropriation have to be proved by the prosecution for establishing the offence under section 13(1)(c) of the PC Act as well. [See Jaikrishnadas Manohardas Desai and Another v. State of Bombay, AIR 1960 SC 889, Raghavan K v. State of Kerala, 2012 KHC 420 and Vijayakumar v. State of Kerala, 2016 KHC 635].

11. As stated already, the entrustment of the amount of

2,10,000/- with the accused Nos. 1 and 2 has been proved. The next question is whether a portion of that amount, 56,503/- was misappropriated by the accused Nos. 1 and 2 as alleged by the prosecution.

12. Ext.P1 is the purchase order issued from the Thodiyoor Grama Panchayat for the purchase of 70 sewing machines. It bears the signature of accused Nos. 1 and 2. It is addressed to the

accused No.3. In Ext.P1, there was a request to supply 70 numbers of sewing machines with all accessories. The rate of the sewing machine is not mentioned in Ext.P1. However, on the left bottom corner side of Ext.P1, there is an endorsement that the machine will be supplied at the rate of 1,900/- per machine. PW1, the General Manager of Singer India Ltd., identified the said endorsement as that of Mr.M.Murali, who was the Regional Manager of Singer India Ltd., during the relevant period and who was the subordinate officer. It has come out in evidence that Ext.P1 purchase order was sent to the Zonal Office of Singer India

Ltd., Madras and accordingly Ext.P2 invoice-cum-challan was issued from the office at Edappally. Ext.P2 is addressed to the accused No.1. It has also come out in evidence that, Ext.P2 was sent along with 70 sewing machines in a lorry and they were delivered to accused No.1. On the reverse side of Ext.P2, the accused No.1 has endorsed that he has taken delivery of 70 sewing machines. The cost of 70 sewing machines supplied by the Singer India Ltd. to the Panchayat is only

1,32,997/- as seen from Ext.P2. In Ext.P2 it is clearly mentioned that 30.02% discount was

given and the total amount of 1,32,997/- was arrived at after deducting the discount. The accused did not challenge Ext.P2. So, it has been satisfactorily proved that the total cost of the 70 sewing machines supplied by the Singer India Ltd. to the Panchayat was only 1,32,997/-.

13. Ext.P20 is the contingent bill for 1,99,500/- towards

the cost of 70 sewing machines at the rate of 2,850/- per machine. Ext.P20 is signed by both the accused Nos. 1 and 2. They do not dispute their signature therein. It is stated in Ext.P20 that, it was passed for payment of 1,99,500/- and the cheque No.132756 dated 06/04/1998 was issued. Ext.P21 is the counterfoil of cheque book of the Panchayat and Ext.P21(a) is the counterfoil of cheque No.132756 dated 06/04/1998. Those documents coupled with the evidence of PW5 would clearly prove that an amount of 1,99,500/- was encashed. Ext.P22 is the cash book of the Panchayat for the period from 08/01/1998 to 31/03/2000. There is an endorsement in Ext.P22 that on 06/04/1998, cheque No.132756 for a sum of 1,99,500/- was encahsed by the Panchayat. It is separately marked as Ext.P22(a). Ext.P23 is the

Plan Personal Deposit account of the Panchayat. As per Ext.P23(a), a sum of 1,99,500/- was encashed on 06/04/1998 through cheque No.132756. It is shown as 'paid to Singer India Ltd.'. Ext.P24 Treasury Pass Book would also show that an amount of 1,99,500/- was withdrawn as per cheque No.132756. The evidence of PW15, the Treasury Officer, Karunagappally, PW16, the Manager of SBT, Karunagappally Treasury Branch and Ext.P39 Government Payment Debits Scroll also would prove that, Panchayat has withdrawn 1,99,500/- as per cheque No.132756. PW1 deposed that as per Ext.P2 invoice, the Singer India Company Ltd. claimed only 1,32,997/-. He further deposed that, even though accused No.3 collected the said amount, he sent only 80,000/- to the Company. Noting the said discrepancy, the Central

Taxes Department of Thiruvananthapuram Commissionerate initiated action under Section 45-A against Singer India Ltd. They issued Ext.P6(b) notice calling upon the Company to explain why 1,99,500/- was seen encashed by the Panchayat by way of cheque No.132756 for payment of the money to the company. The company replied through Ext.P6(d) that they entered into the

transaction only for a sum of 1,32,997/-. From the evidence discussed above, the prosecution has succeeded in proving beyond reasonable doubt that the Singer India Ltd. Company supplied 70 sewing machines to Thodiyoor Grama Panchayat for an amount of 1,32,997/- but accused Nos. 1 and 2 prepared Ext.P20 contingent bill for a sum of 1,99,500/- and withdrew the said amount from the public account of the Panchayat by using cheque No.132756 dated 06/04/1998. The accused Nos. 1 and 2 have no explanation, as to what happened to the balance amount of 56,503/-. In fact, they are blaming each other.

14. It has come out in evidence that, the tender to purchase

70 sewing machines was invited in violation of the Stock Purchase Manual without publishing the same in the newspaper. The accused Nos.1 and 2 contended that, in case of limited tenders it is not necessary to make publication in the newspaper. The evidence of PW1 and PW5 proves that without taking a correct decision in the Panchayat meeting, accused Nos.1 and 2 decided to avoid the paper publication and invited the tenders. The limited tender system can be adopted only in certain contingencies. Those

contingencies were not prevailing in this case, when accused Nos. 1 and 2 decided to adopt a limited tender system. The evidence on record proves that, in violation of the Rules and without taking a decision in the Panchayat Committee, accused Nos. 1 and 2 decided to purchase the sewing machines without making any publication in the newspaper. It has also come out in evidence that, no proper tenders were invited or received before accepting the quotation from Singer India Ltd. As stated already, even after receiving Ext.P2 invoice for an amount of 1,32,997/-, the accused Nos.1 and 2 issued Ext.P20 contingent bill for an amount of 1,99,500/-. This definitely points out the agreement or meeting of mind between them so as to attract criminal conspiracy. It has also come out in evidence that, Exts.P18(a) and P18(b) Minutes were falsely created so as to appear that the Panchayat committee has decided to invite tenders without publication in the newspaper, that too in violation of the statutory provisions. It has also come out in evidence that, in spite of Ext.P2 invoice, accused Nos.1 and 2 intentionally created false documents i.e., Ext.P20 contingent bill for an amount of 1,99,500/- and also prepared the cheque for the

same amount and withdrew the amount. So, the offence under Section 477-A of the IPC is attracted. It is not in dispute that, accused Nos. 1 and 2 were public servants during the relevant period. It has come out in evidence that, they misusing their official position as public servants misappropriated a sum of 56,503/- out of the amount of 2,10,000/- entrusted with them. Thus, offence under section 13(2) r/w 13(1)(c) and (d) of the PC Act are also attracted.

15. The learned counsel for the accused No.2 next

submitted that Ext.P41 Sanction Order for prosecution has not been properly proved by the prosecution. PW18 is the Additional Secretary of Vigilance Department who issued Ext.P41 Sanction

Order to prosecute the accused. He deposed that the entire

records in the case were forwarded to him by the Vigilance Department and after perusing and studying the records, he issued Ext.P41 Sanction Order. His evidence coupled with Ext.P41 would show that he has applied his mind before granting sanction. Hence, the submission of the learned counsel that the sanction for prosecution has not been proved in accordance with law also must

fail.

16. The court below has appreciated the evidence on

record in the correct perspective and rightly found that the prosecution has succeeded in proving beyond reasonable doubt that the accused Nos. 1 and 2 have committed the offence punishable under Sections 13(2) r/w 13(1)(c) and (d) of the PC Act and Sections 477A and 120-B of the IPC. On reappreciation of evidence, I find no reason to interfere with the said findings of the court below. Considering the entire facts and circumstances of the case, the sentence imposed by the court below also appears to be reasonable. The appeals fail and are only to be dismissed.

In view of the above finding, Crl.A.No.2369/2009 and Crl.A.No.2239/2009 are dismissed and Crl.A No.1620 of 2013 filed by the State is dismissed as abated. Sd/- DR.KAUSER EDAPPAGATH, JUDGE KP/APA

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