

Khyamasagar Baina Vs. State

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Court : Orissa

Decided On : Aug-01-2003

Reported in : 2004CriLJ2225; 2003(II)OLR255

Judge : A.S. Naidu, J.

Acts : [Prevention of Corruption Act, 1988](#) - Sections 13

Appeal No. : Crl. Appeal No. 125 of 2000

Appellant : Khyamasagar Baina

Respondent : State

Advocate for Def. : D.K. Mohapatra, Adv.

Advocate for Pet/Ap. : D.P. Das, Adv.

Disposition : Appeal allowed

Judgement :

A.S. Naidu, J.

1. The appellant and one Prasanta Kumar Dora who were serving as a Peon and a Junior Clerk respectively at the George High School, Bargarh faced trial for alleged commission of offences under Section 13(1)(d)/13(3)/7 of the Prevention of Corruption Act read with Section 34 of the Indian Penal Code.

2. Bereft of all unnecessary details, the short facts of the case are that P.W. 3, an ex-student of the George High School, Bargarh had discontinued his studies in the year 1988 and had taken his transfer certificate from the school. Unfortunately his transfer certificate was eaten away by white-ants. So in the month of May, 1995 he applied to the Headmaster of the aforesaid school for issue of a duplicate transfer certificate. His application was sent to Prasanta Kumar Dora, the Clerk-in-charge. The latter asked P.W. 3 to contact the appellant-Peon. It was alleged that when P.W. 3 met the appellant and asked him about the paraphernalia, the latter advised him to make a Station Diary Entry at the police station about the loss of his transfer certificate and to swear an affidavit to that effect and then meet him with the aforesaid two documents. Though P.W. 3 complied with the said requirements and met the appellant and Shri Dora several times, the matter was stalled over on some pretext or other. At last, on 20-8-1995 the appellant-Peon told him that unless he (P.W. 3) spent a sum of Rs. 200.00, a duplicate transfer certificate from the school could not be issued. P.W. 3 being a poor man expressed his incapacity and at last agreed that he would pay Rs. 150.00 to the Clerk. On 22-8-1995 P.W. 3 went to the school and paid a sum of Rs. 30.00 to the appellant-Peon expressing that he could not arrange the rest amount.

The appellant, it is stated, instructed P.W. 3 to arrange the balance amount of Rs. 120.00 by next day for payment to the Clerk. Being disgusted, P.W. 3 reported the matter to the Vigilance Police by writing a letter to the S.P., Vigilance, Sambalpur. The Dy. S.P., Vigilance, Sambalpur was entrusted with the investigation and he decided to lay a trap against the accused persons. Accordingly preparation for the trap was made and soon after the appellant-Peon accepted the money from P.W. 3, on receiving signal from an independent witness the Inspector of Vigilance and others arrested the appellant and the Clerk. They seized the amount paid by P.W. 3. After obtaining sanction from the competent authority for prosecution, the accused persons were charge-sheeted and they faced the trial.

The plea of the accused persons was complete denial. The appellant-Peon took a specific plea that paper publication regarding loss of original transfer certificate was a prerequisite for issuing a duplicate transfer certificate. Accordingly, on the request of P.W. 3 he had received Rs. 150.00 for taking steps for publication of the

news in a local newspaper. In short, his plea was that the amount received by him from P.W. 3 was not towards bribe or illegal gratification, but towards the cost of paper publication,

3. Prosecution examined six witnesses, out of whom P.W. 3 was the complainant, P.W. 1 was a Junior Clerk of the Tahsil Office who was an independent witness being set up by the Vigilance Department to accompany P.W. 1 and to overhear the conversation. P.W. 1 was also instructed to give signal so as to enable the raiding party to recover the amount paid. P.W. 5 was the B.D.O., Bargarh who was an Executive Magistrate and had been assigned the duty to accompany the trap party and witness the detection. P.Ws. 2 and 4 were the sanctioning authority who accorded sanction of the prosecution. P.W. 6 was the Inspector of Vigilance and the Investigating Officer in the case. Prosecution also produced sixteen documents.

4. On behalf of the defence, no witness was examined, but two documents, being the Xerox copies of the instructions issued by the D.P.I. of Schools regarding issuance of duplicate transfer certificate and the instructions issued by the Inspector of Schools regarding the same matter were produced which were marked Exts. Z and X respectively.

5. The trial Court after discussion of the evidence of P.W. 3, the decoy witness, and the evidence of other witnesses, arrived at the conclusion that there was absolutely no material so as to find accused-Clerk guilty of any of the charges levelled against him, and held that it had no hesitation to hold that the appellant-Peon only had received the amount of Rs. 120.00 from P.W. 3 as bribe and he had failed to dispel the presumption that arose against him under Section 20(1) of the [Prevention of Corruption Act, 1988](#) and accordingly held the appellant-Peon guilty of the charges under Section 13(2) and under Section 7 of the Prevention of Corruption Act and convicted him thereunder while acquitting the accused-Clerk, namely, Prasanta Kumar Dora. The trial Court sentenced the appellant-Peon to undergo rigorous imprisonment for one year and to pay a fine of Rs. 100,00 in default to undergo further rigorous imprisonment for fifteen days for conviction under Section 13(2) and to undergo rigorous imprisonment for six months and to

pay a fine of Rs. 100.00 in default to undergo further rigorous imprisonment for fifteen days for his conviction under Section 7 of the said Act. Both the sentences of rigorous imprisonment were directed to run concurrently. The said order of conviction and sentence is impugned in this Criminal Appeal.

6. Mr. D. P. Das, learned counsel for the appellant, strenuously took me through the evidence of all the witnesses and argued that the learned Special Judge had completely lost sight of the evidence adduced by the prosecution which rather went in support of the defence plea and thus committed material irregularity. According to him, the trial Court misdirected itself in raising a presumption under Section 20(1) of the Act in the absence of any evidence that the appellant-Peon habitually accepted or obtained or agreed to accept or obtain illegal gratification. It was also stated by him that in view of the clear admission of the prosecution witnesses that the amount of Rs. 120.00 had been received by the appellant-Peon towards cost of paper publication, the trial Court acted illegally and contrary to the evidence in convicting the appellant-Peon. It was further stated that though the specific case of the prosecution was that the amount had been received by the appellant-Peon for payment to the accused-Clerk, the Court below committed gross illegality in acquitting the Clerk and convicting the appellant on the basis of the same evidence. In substance, according to Mr. Das, the Court below misdirected itself and the order of conviction and sentence was based on surmises and conjectures and not on the basis of evidence on record.

7. Mr. D. K. Mohapatra, learned counsel for the Vigilance Department, at the other hand strenuously submitted that the appellant having received the amount and having been caught red-handed in the trap, the offence under Section 7 of the Prevention of Corruption Act had been clearly made out. According to him, it is a case where presumption under Section 20 of the Prevention of Corruption Act also clearly comes to the aid of the prosecution. According to Mr. Mohapatra, the appellant was not competent nor authorised to make paper publication. Admittedly he having received the amount of Rs. 120.00, it should be presumed that the said amount had been received by him as bribe for discharging his official work.

8. Section 7 of the Prevention of Corruption Act provides for punishment of a public servant receiving a bribe. Before holding that a public servant has committed an offence under Section 7 of the Act, the following requirements have to be satisfied :--

(1) that the accused at the time of commission of the alleged offence was or expected to be a public servant;

(2) that he accepted, or obtained, or agreed to accept, or attempted to obtain from some person a gratification;

(3) that such gratification was not a legal remuneration due to him; and

(4) that he accepted the gratification in question as a motive or reward for

(a) doing or forbearing to do an official act; or

(b) showing or forbearing to show favour or disfavour to someone in exercise of his official function; or

(c) rendering or attempting to render any service.

To establish that an offence under Section 7 was committed, all that the prosecution has to establish is that the accused was a public servant and that he had obtained the illegal gratification for showing or forbearing to show favour in the exercise of his official function. Further, in order to make out a case under Section 7, prosecution has, apart from showing that the accused was a public servant, also to prove that bribe or gratification had been received for doing his official act.

9. Keeping the aforesaid principles in mind, being the final Court of facts, I scrutinised the evidence, both oral and documentary, adduced in the case. The FIR, Ext. 7, which was the root of the case, reveals that after consulting the accused-Clerk all that the appellant -Peon told P.W. 3 was that he had to swear an affidavit and fulfil the other requirements and for that purpose he had to spent at least Rs. 200.00. The FIR does not reveal that either the appellant or the Clerk had demanded Rs. 120.00 towards bribe or gratification.

10. Before proceeding with the case, one thing has to be kept in mind that the appellant was only a Peon. He had no authority or power to issue a duplicate transfer certificate. The Headmaster who was examined in the case as P.W. 2 in his deposition has clearly stated that in case of issuance of a duplicate transfer certificate, the applicant is asked to deposit money for publication in the newspaper to the effect that the original transfer certificate has been eaten away by white-ants or lost. The complainant who had been examined as a decoy witness P.W. 3, in the first paragraph of his deposition has stated :

'The accused-Peon told me to make paper publication in the paper and report in the police station that white-ants have eaten my transfer certificate in original.'

He has admitted in his deposition that though he made a Station Diary in Bargarh Police Station and swore an affidavit vide Ext. 5, and had deposited Rs. 2.00 by treasury challan towards fees vide Ext. 6, he had not made any paper publication.

11. In paragraph-4 of his deposition, P.W. 3 has further stated :

'It is the accused-Peon only who told me that Rs. 150.00 would be necessary for paper publication and he told me to give that Rs. 150.00 for that purpose.'

The last sentence of his deposition reads as follows :--

'I thought it that they were harassing me and the money required by them was as bribe, and not for paper publication and that with that impression I reported the matter to the Vigilance authorities.'

This statement makes it clear that it was only on the basis of surmises and conjectures that the amount asked for was towards bribe and not for paper publication, P.W. 3 had made the complaint.

12. P.W. 1 was the most important witness. He was an independent witness set up by the Vigilance Department to accompany P.W. 3 the decoy witness and to overhear the conversation and give signal for the Vigilance party to trap. Apart from describing the entire procedure as to how the currency notes were treated with chemicals and as to how the trap was conducted, in paragraph-3 of his

deposition he has stated that the decoy witness had explained to him that the expenses that were indicated by the accused-Peon were for paper publication. He also stated that the accused-appellant enquired from the decoy witness whether he had brought the money to be spent towards the cost of paper publication. P.W. 3 answered in affirmative and paid the tainted notes to him. According to P.W. 1, when the Vigilance Party challenged the accused-appellant and the Clerk for accepting bribe from the decoy witness, immediately the accused-appellant replied that he had received the money towards the cost of paper publication and then he voluntarily brought out the tainted notes from his pant pocket and produced before the trap party. This fact also gets further corroborated from the detection report prepared by the I.O. at the spot which has been marked Ext. 2. It is apt to mention here that Ext. 2 was the first document after the trap was successful. That was prepared in the presence of both the independent witnesses. The said report reveals :

'On examination of Shri Khyamasagar Baina, Peon (accused of the case) he stated that he accepted the amount of Rs. 120.00 from the complainant Shri Nayak not as bribe, but for giving advertisement in the local newspaper.'

The said report was signed by all the witnesses present during the trap.

13. In view of the aforesaid oral and documentary evidence, now the question arises as to whether the presumption under Section 20 of the Prevention of Corruption Act is of any assistance to the prosecution.

For finding out whether a particular act amounts to receiving gratification/bribe within the meaning of the Act, it is necessary that there should be a motive for showing favour by the accused coupled with the fact that the recipient of such bribe or gratification has an authority or right to show any favour in course of discharging his official duty. Both the aforesaid tests miserably fall in this case, inasmuch as the appellant was only a Peon and he had no authority or right to show any favour to the complainant. It is not the receipt of a bribe alone that constitutes the offence, but it must have been received as a motive or reward to do any official act. The word 'motive' evidently refers to a future act. A person may receive some amount for doing an act which he is not officially authorised to do. In

these circumstances, unless the prosecution proves that the money paid was not towards any other purpose but towards gratification, to show favour, the Court cannot take recourse of any presumption.

14. In the case of Surajmal v. State, AIR 1979 SC 1408 : (1979 Cri LJ 1087), the Supreme Court held that in a case bribery, mere recovery of money diverse from the circumstances under which it is paid is not sufficient to convict the accused without the substantive evidence in the case is not reliable. The ratio of the said decision squarely applies to the present case. The complainant in his deposition has clearly stated that the accused asked for money for paper publication. The paper publication is a mandatory requirement for issuing a duplicate transfer certificate. He has also stated that he presumed that the money so demanded was as bribe, though he was not sure about it. The evidence of the independent witness P.W. 1 and the detection report Ext. 2 also clearly reveal that the amount was received towards the cost of paper publication, which supports the plea of defence. The appellant in his statement under Section 313, Cr. P.C. also clearly stated that the amount was paid by the complainant to meet the expenses that was to be incurred for paper publication. As has been held by the Supreme Court in the case of Punjabrao v. State of Maharashtra, AIR 2002 SC 486, the explanation given by the accused for receipt of the money need not be proved by him beyond all reasonable doubts. He can establish his defence by preponderance of probabilities.

15. After going through the evidence of P.Ws. 1, 2 and 3 coupled with the detection report Ext. 2, I feel that not only prosecution has miserably failed to prove its case, but also the plea taken by defence throws a cloud of suspicion in the mind with regard to commission of the offence by the appellant as alleged by the prosecution.

16. On a cumulative assessment of the facts and circumstances as also the evidence, both oral and documentary, I feel that it is fit case where the benefit of doubt should be in favour of the accused.

17. In the result the Criminal Appeal is allowed. The impugned judgment of the learned Special Judge, Vigilance, Sambalpur dated 22-5-2000 in the T.R. Case

No. 7 of 1996 is set aside. The accused-appellant is acquitted of the charges levelled against him. The bail-bond executed by him be discharged.

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