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R.Maheswara Vs. State Represented By

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Court : Chennai

Decided On : Dec-09-2014

Judge : The Honourable Ms.Justice R.Mala

Appellant : R.Maheswara

Respondent : State Represented By

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

09. 12.2014 CORAM THE HONOURABLE MS.JUSTICE R.MALA Criminal Appeal (MD)No.362 of 2005 R.Maheswaran : Appellant/Accused Vs. State represented by The Deputy Superintendent of Police, Vigilance and Anti-Corruption, Tirunelveli in Crime No.8/2000. : Respondent/Complainant Prayer : Criminal Appeal is filed under Section 374(1) of the Code of Criminal Procedure r/w 27 of the Prevention of Corruption Act praying to set aside the conviction and sentence passed against the appellant in the judgment dated 14.07.2005 made in Special Case No.1 of 2001 on the file of the learned Chief Judicial Magistrate -cum- Special Judge, Tirunelveli and allow this appeal. !For Appellant :: Mr.K.K.Kannan ^For Respondent :: Mrs.S.Prabha, Government Advocate (Crl. Side) :

JUDGMENT

The appellant/accused has come forward with this appeal challenging his conviction and sentence passed by the learned Chief Judicial Magistrate -cum-

Special Judge, Tirunelveli, dated 14.07.2005 made in Special Case No.1 of 2001, whereby and whereunder, the appellant was convicted for the offences punishable under Sections 7 and 13(2) r/w 13(1)(d) of Prevention of Corruption Act and sentenced him to undergo one year RI, to pay a fine of Rs.1,000/-, in default, to undergo 3 months RI for the offence punishable under Section 7 of Prevention of Corruption Act and sentenced to undergo one year RI, to pay a fine of Rs.1,000/-, in default, to undergo 3 months RI for the offence punishable under Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act.

2. The case of prosecution, in a nutshell, is as follows: (i) P.W.2 Yovan is residing at Rettarkulam. He purchased the land from one Vijayakonar, who has given power of attorney to one Gomathi Nayagam. For the purpose of changing patta in his name, he has produced relevant documents before the Tahsildar, Nanguneri with an application to survey the land. That was registered in direct transfer Register No.452/02 at page No.3. That was marked as Ex.P.5. The report given by the accused regarding the said petition was marked as Ex.P.15. After surveying the land, P.W.2 was asked to get the patta from the Village Administrative Officer by showing the order regarding survey. When P.W.2 asked the patta, the accused demanded a sum of Rs.300/- as illegal gratification. Feeling aggrieved, P.W.2 went to the Vigilance and Anti-Corruption Wing and gave a complaint Ex.P.2 on 15.11.2000 at 11.45 a.m. (ii) In pursuance of which, P.W.4 Joseph, Inspector of Police, Vigilance and Anti-Corruption Wing, registered a case in Crime No.8 of 2000 for the offence punishable under Section 7 of Prevention of Corruption Act and he recorded F.I.R.-Ex.P.8. Thereafter, trap witness was called upon and trap proceedings have been initiated and on the very same day, the accused was caught red handed, while demanding and accepting the illegal gratification of Rs.300/- from P.W.2, which was kept in the left side shirt pocket of the accused. Thus, the accused, by misusing his official position as Government servant, obtained illegal gratification of Rs.300/- from the complainant P.W.2, for the purpose of issuing patta and, thereby, he committed the offences punishable under Sections 7 and 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988. (iii) P.W.12 Perumalsamy, Deputy Superintendent of Police, took up the case for further investigation and recorded the statement of witnesses and thereafter, P.W.13 Manickarao, Deputy Superintendent of Police, Vigilance and Anti-

Corruption, after receiving the sanction order Ex.P.1 accorded by P.W.1 Thambidurai, filed a final report against the accused. (iv) The learned trial Judge, after following the procedures, framed necessary charges against the accused. Since the accused denied the same in toto and pleaded not guilty, to prove the charges, P.Ws.1 to 13 were examined and Exs.P.1 to P.22 were marked along with M.Os.1 to 10 on behalf of the prosecution. On completion of the examination of the witnesses on the side of the prosecution, the accused was questioned under Section 313 Cr.P.C., as to the incriminating circumstances found in the evidence of the prosecution witnesses and he denied the same as false. On behalf of the defence, no witness was examined and no evidence was marked.

3. The learned trial Judge, after considering the oral and documentary evidence, convicted and sentenced the appellant as stated above, against the which, the present appeal has been preferred.

4. Assailing the conviction and sentence passed against the appellant, the learned counsel for the appellant would submit that the Investigating Officer, who has investigated the case, is only the Inspector of Police, Vigilance and Anti-Corruption and he is not the competent person to investigate the matter under Section 7 of Prevention of Corruption Act. He would further submit that the case of the prosecution is that the appellant demanded money for grant of patta, but whereas, before that, he has recommended for issuance of patta and that factum has not been considered by the Trial Court.

5. Relying on the decision of the Apex Court in 2002 SCC (Cri) 954 [Subash Parbat Sonvane v. State of Gujarat]., the learned counsel would submit that statutory presumption under Section 20 of Prevention of Corruption Act is available for the offence punishable under Section 7 and not for the offence punishable under Section 13 (1)(d).

6. Placing reliance on the decisions reported in 2008(1) MLJ (Crl) 372 (SC) [K.Subba Reddy vs. State of Andhra Pradesh]. and 2006(2) MLJ (Crl) 1001 [State v. Subramanian]., he would submit that the second demand has not been proved and P.W.2 Yovan, the defacto complainant himself turned hostile. In his chief, he has stated that he lent Rs.300/- to the appellant to enable him to go to

Tiruchendur. He has not stated that the appellant herein has demanded bribe for issuance of patta. Further, it was stated that on the day, there was a meeting. It was over at 3.30 p.m. All the Village Administrative Officers and menials have attended the meeting and decided to issue patta to the needy people. Hence, he prayed for setting aside the conviction and sentence, since there is no evidence produced to prove the second demand and acceptance .

7. Resisting the same, the learned Government Advocate (Criminal side) would submit that in view of the decision in Mehkar Singh vs. Central Bureau of Investigation in Crl.Appeal No.746/2002, the evidence of shadow witness is sufficient to convict the accused. Taking through the evidence of P.W.3, she would submit that the Trial Court has considered all the aspects in proper perspective and came to the correct conclusion. Hence, she prayed for dismissal of the appeal.

8. Considering the rival submissions made by both sides and on perusal of the typed-set of papers, it is seen that the appellant herein is the Village Administrative Officer. P.W.2 approached the appellant for issuance of patta, for which, the appellant had demanded a sum of Rs.300/- as an illegal gratification. The first demand was made on 15.11.2000 at 06.30 a.m. Being not satisfied, he gave a complaint before P.W.4 Joseph, trap laying officer and on the basis of which, a case has been registered. The shadow witness P.W.3 and another witness have been called and during trap laying process, the appellant was caught red handedly.

9. It is well settled principles that in order to bring home the offence under Section 7 of Prevention of Corruption Act, the prosecution must prove the first demand, second demand before tendering the bribe amount, acceptance, recovery and positive result of phenolphthalein test.

10. However, in the case on hand, it is true that P.W.2, who is the defacto complainant, turned hostile and there is no evidence to show that there is a demand on 15.11.2000. It is also well settled dictum of the Apex Court that FIR is not a substantial piece of evidence and it can be used for corroboration and contradiction. Here, P.W.2, in his cross examination, had stated that he do not

know as to whether he has given a complaint. But, he had stated that the signature is belonging to him. That complaint has been marked as Ex.P.2. The learned counsel would submit that the signature itself is not sufficient to accept the contents of the FIR. However, he was treated hostile.

11. In such circumstances, this Court ought to have considered the decision relied upon by the Government Advocate (Criminal side) in Mehkar Singh vs. Central Bureau of Investigation in Crl.Appeal No.746/2002, wherein it was held that in the case of an offence of demanding and accepting illegal gratification, depending on the circumstances of the case, the Court may feel safe in accepting the prosecution version on the basis of the oral evidence of the complainant and the official witnesses even if the trap witnesses turn hostile or are found not to be independent. When besides such evidence, there is a circumstantial evidence which is consistent with the guilt of the accused and not consistent with his innocence, there should be no difficulty in upholding the conviction.

12. Relying on the said decision, the learned Government Advocate (Criminal side) would submit that even though the trap witness is not an independent witness, his evidence is reliable, even he turned hostile. On the basis of the defacto complainant's evidence, conviction can be granted.

13. However, the above citation is not applicable to the facts of the present case, because here P.W.2 the defacto complainant himself turned hostile. He is the best person to depose about the first demand. It is also well settled dictum of the Apex Court that the evidence of hostile witness is admissible, provided it must support the case of either prosecution or defence. Here, P.W.2, in his evidence, had stated that on 08.11.2000, at 05.30 p.m., when he demanded the patta, the accused handed over the patta through the Village Head Chellapandi. As per the evidence of P.W.2, patta has been issued to him only on 08.11.2000. Furthermore, as per the evidence of P.Ws.6,7,8,9, on the day, there was a meeting conducted at the office of Revenue Inspector and all the Village Administrative Officers and village menials have attended the meeting and patta has been issued to the needy people. The meeting was over at 03.30 p.m. In such circumstances, it is unbelievable that on 15.11.2000 the appellant has demanded Rs.300/-. It is true

that the tainted money has been recovered from the appellant and phenolphthalein test has been in positive, as per the evidence of P.W.11- Thamaraiselvan, Scientific Assistant. But mere acceptance and recovery is not a ground for conviction.

14. The learned counsel for the appellant has taken me through the decision in 2013(3) MLJ (Crl) 565 (SC) [State of Punjab v. Madan Mohan Lal Verma]., wherein it was held that mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. It is appropriate to incorporate paragraph No.7 of the said judgment, which reads thus: "7. The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convicting the accused person."

15. Relying upon the decision reported in 2002 SCC (Cri) 954 [Subash Parbat Sonvane v. State of Gujarat]., he would submit that statutory presumption under

Section 20 of the Prevention of Corruption Act is available for the offence punishable under Section 7 of Prevention of Corruption Act. However, the above argument does not hold good, because it is the duty of the prosecution to prove the ingredients of provision of law and then only, the burden is shifted to the accused to rebut the same. As such, the above citation is not applicable to the case on hand.

16. Placing reliance on the decision rendered in 2008(1) MLJ (Crl) 372 (SC) [K.Subba Reddy vs. State of Andhra Pradesh]., he would submit that in corruption case, if the explanation offered by the accused is acceptable one and there is no material available to prove the guilt of the accused, conviction is not maintainable. But in the said case, there are two accused. The second accused received the money on the instruction of A-1 without knowing that he is receiving the bribe amount. Hence, the above citation is not applicable to the case on hand.

17. In support of his contention, he also relied upon the decision reported in 2006(2) MLJ (Crl) 1001 [State v. Subramanian]., wherein it was held that however strong the suspicion against the accused, if every reasonable possibility of innocence has not been excluded, in the absence of proof of demand and acceptance of money as illegal gratification, if the accused offers reasonable and probable explanation based on evidence, the accused would be entitled to acquittal. However, the said citation is not applicable to the facts of the present case, because, in the case on hand, P.W.2, the defacto complainant himself turned hostile and he has not supported the case of the prosecution. Even though P.W.3 shadow witness has stated the second demand, he is not a competent person, since P.W.2, who is the defacto complainant, turned hostile, who is the competent person to speak about both the first and second demand before tendering the tainted money. Per contra, P.W.2 himself had stated in his evidence that he paid Rs.300/- as loan to the appellant for visiting the temple at Tiruchendur. In such circumstances, the trial Court, without considering the fact that the defacto complainant has not supported the case of the prosecution, that too, the second demand, which is the basic ingredients for convicting the accused under Section 7 of the Prevention of Corruption Act, has committed an error in convicting the accused under the said provision. Furthermore, the accused, who is

the Village Administrative Officer, is not a competent authority to issue patta. The Tahsildar alone is the competent authority to issue patta. As per the evidence of P.W.2, he has received the patta on 08.11.2000 itself. Those facts have not been considered by the Trial Court. The trial Court, after considering the evidence of P.W.3, shadow witness and P.W.4 trap laying officer, held that the demand and acceptance has been proved by P.W.3. However, his evidence is not corroborated by any other evidence. In such circumstances, I am of the view that the conviction passed by the trial Court is unsustainable and it is liable to be set aside.

18. In the result, the appeal is allowed. The conviction and sentence passed by the learned Chief Judicial Magistrate -cum- Special Judge, Tirunelveli, dated 14.07.2005 made in Special Case No.1 of 2001 are set aside. The appellant is acquitted from the charges levelled against him. The fine amount, if any, paid by the appellant shall be refunded to him. The bail bond, if any, executed by the appellant shall stand cancelled. 09.12.2014 Index:Yes/No Internet:Yes/No SML To 1.The Chief Judicial Magistrate -cum- Special Judge, Tirunelveli. 2.The Deputy Superintendent of Police, Vigilance and Anti-Corruption, Tirunelveli. R.MALA, J.

SML3The Public Prosecutor, Madurai Bench of Madras High Court, Madurai. Judgment made in Criminal Appeal (MD)No.362 of 2005 Dated:

09. 12.2014

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