

ORISSA HIGH COURT: CUTTACK

Criminal Appeal No. 89 of 1990

From the judgment of conviction and order of sentence dated 28.03.1990 passed by Sri S.C. Mishra, Special Judge (Vigilance), Sambalpur in T.R. Case No.2 of 1987

Manoranjan Mohanty

...

Appellant

Versus

State of Orissa

...

Respondent

For the Appellant

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M/s. N.C. Pati, S.K. Swain,
B. Sahoo and R.N. Dash

For the Respondent

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Miss. Savitri Ratho
(Standing Counsel)

P R E S E N T

THE HONOURABLE MR. JUSTICE S.K.MISHRA

Date of Judgment – 26.02.2014

S.K.Mishra, J.

In this appeal, the appellant assails the judgment of conviction and order of sentence dated 28.03.1990 passed by the learned Special Judge (Vigilance), Sambalpur.in T.R. Case No.2 of 1987 convicting him for the offence under Section 161 of the Indian Penal Code, 1890 read with Section 5(2) of the Prevention of Corruption Act, 1947, hereinafter referred to as 'the Act' for brevity.

2. Facts of the case may be narrated briefly as follows:

The complainant, one Khemchand Agrawalla, had entered into a partnership with his brother and father in the name of "Chhabila Chandra Ghasiram". The firm was appointed as storage agent and made security deposit of Rs.10,000/-

at Kanara Bank, Bhuban in the district of Dhenkanal. The firm appointed the complainant as its representative and executed power of attorney. As there was loss of business, the firm informed the Collector that it would not proceed with the business and accordingly, it was stopped. In 1982, the firm applied for refund of security deposit.

The complainant pursued in the Civil Supply Office (CSO) and requested the Auditor to refund the security deposit. The authority of the said office said that the file was lost. On 01.12.1984, the complainant applied for refund of security deposit and for that purpose he approached the CSO one Mr. Rath. Accordingly, he instructed the accused to finalize the matter. However, the accused said that the file was not traceable and as such, all papers were to be prepared afresh. In order to do all these things, the accused demanded Rs.1000/-. Despite repeated request by the complainant, it was not complied with by the accused. In 1986, the complainant requested his brother Lal Babu working as Chartered Accountant at Bhubaneswar to look into the matter. At that time, his brother rang up to the CSO and the telephone was received by one Sasmal Babu of the Accounts Section, who replied that the file was available and the matter would be finalized. Thereafter, the complainant talked to the Sasmal Babu, who said that the file was available and instructed him to talk with the accused.

On 24.03.1986, the complainant requested to the accused to give clearance certificate for refund of security deposit. But, the accused replied that there was no value in the file and all the papers were to be prepared afresh. For that purpose, he wanted bribe of Rs.1000/-. The complainant replied that as his business was not flourishing and he incurred loss, he would be able to pay Rs.200/- to 300/-. However, the accused insisted upon payment of Rs.1000/-. Hence, the complainant

reported the matter to the Vigilance Department. Thereafter, he made a request before the accused that he would be able to arrange Rs.600/- and would pay the same on the next day and the balance would be paid later on. The accused agreed on the bargain and wanted Rs.40/- for preparation of paper book and accordingly, it was paid by the complainant. As the accused demanded Rs.600/- immediately otherwise refused to do his work, the complainant finding no other way was compelled to agree with the same. Accordingly, he lodged FIR before the Inspector of Vigilance, Dhenkanal, who submitted the same to the S.P., Vigilance, Sambalpur and a case was registered under Section 5(2) read with Section 5(1)(d) of the P.C. Act, 1948 and Section 161 of the I.P.C.

A trap was arranged on 25.03.1986. For this purpose, the presence of P.W.3, accompanying witness was secured, the pre-trap procedure was conducted and the complainant produced six nos. of hundred rupee G.C. notes, which were tainted with phenolphthalein powder and the same was given to him to keep it in his left side shirt chest pocket. The raiding party proceeded to the C.S.O. After arriving at the office, the complainant talked to the accused and paid Rs.600/- in the shape of currency notes in the presence of P.W.3. P.W.3 gave a signal as it was prearranged by rubbing his back side of head. Thereafter, the vigilance staff and the Magistrate rushed to the spot and the accused was standing in front of the accounts section, who was identified by the complainant. The Inspector of Vigilance challenged the accused to have accepted bribe of Rs.600/- and wanted him to give his hand wash and to produce the bribe. The accused gave his hand wash by dipping fingers in sodium carbonate solution, which turned into pink and that was collected in a glass container. Then, the accused led the I.O. for discovery of the currency notes kept under his office table cloth and accordingly those were recovered, the numbers of

which were tallied with the numbers noted earlier and seized. The solutions preserved were sent for chemical examination. The I.O. seized relevant papers and prepared the detection report and after completion of investigation, he submitted charge- sheet against the accused.

3. The case of the defence is that there was no such demand or acceptance of bribe by the accused. As regards the hand wash of the accused turning pink after dipped in sodium carbonate solution, the explanation of accused is that the complainant might have previously come in touch with the currency notes treated with phenolphthalein power and after arrival of the complainant in the office, the accused shook hand with him and while doing so, the accused might have come in contact with phenolphthalein power from the hands of the complainant. It is alleged that the complainant arranged the files on the table of the accused and the accused took the files to do office work. In that process, he might have come in contract with phenolphthalein power and as such his hand wash might have turned pink. Regarding the recovery of money, the explanation of the accused is that the complainant kept the currency note under the table cloth and during search the I.O. recovered the same from under the table cloth and it was not within the knowledge of the accused.

4. The prosecution, in order to bring home the charges leveled against the appellant, examined 10 witnesses. One witness was examined on behalf of the defence. P.W.1 is the Assistant Accountant of the C.S.O. office, who made over charge of the documents relating to the transaction of the complainant to the accused and is a witness under Ext.1. P.W.2 is the Senior Accounts Supervisor, who received the phone message from the Accounts Officer, Civil Supplies Department, Bhubaneswar named in the FIR and he instructed the accused to expedite the

matter. P.W.3 is the accompanying witness. P.W.4 is the decoy or complainant himself. P.W.5 is the S.I. of Vigilance, who prepared and demonstrated the chemical reaction sodium carbonate solution with phenolphthalein powder in presence of P.Ws.2, 3, 7 & vigilance staff and smeared the G.C. notes with phenolphthalein power. P.W.6 is the C.S.O., who stated about the refund of security deposit and clearance certificate. P.W.7 is the Magistrate, who was present during preparation and raid. P.W.8 is the witness, who obtained the order of sanction and submitted charge sheet. P.W.9 is the Investigating Officer and P.W.10 is the Section Officer, Food and Civil Supplies Department, Bhubaneswar who purported to have proved the sanction order and application of mind by the sanctioning authority.

5. The learned counsel for the appellant in course of hearing contended that the learned Special Judge while dealing with various aspects of the case has entered into conjecture and surmises and has held that the accused is guilty of the offence alleged. It is further contended by learned counsel for the appellant that the P.W.4 has not supported the prosecution case in its entirety and has stated that he has kept the money on the table under table cloth of the accused. Such version is supported by P.W.3, the over-hearing witness. It is, therefore, contended that the judgment of conviction and order of sentence are illegal. The learned Standing Counsel for the Vigilance Department, on the other hand, argued that the findings recorded by the learned Special Judge are correct and there are no reasons to interfere with the same in order to acquit the accused from the charges proved against him. The learned Standing Counsel further relies upon the case of **Biswajit Pattnaik vs. State of Orissa**, (2013) 55 OCR 957. However, it is seen from the reported decision that the decoy or the complainant himself has been declared hostile to the prosecution. The over-hearing witness has supported the prosecution

and has stated about the acceptance of bribe by the accused. Hence, the facts of the reported case stand as a different footing then the present case.

6. The Hon'ble Supreme Court in the case of ***State of Maharashtra vs. Dnyaneshwar Laxman Rao Wankhede***, (2009) 15 SCC 200, at Paragraph-16, has held that indisputably, the demand of illegal gratification is a sine qua non for constitution of an offence under the provisions of the Act. For arriving at the conclusion as to whether all the ingredients of an offence viz. demand, acceptance and recovery of the amount of illegal gratification have been satisfied or not, the court must take into consideration the facts and circumstances brought on record in their entirety. It is further held that for the said purpose indisputably, the presumptive evidence, as laid down in Section 20 of the P.C. Act, 1947, must be taken into consideration but then in respect thereof, it is trite, the standard of burden of proof on the accused vis-a-vis the standard of burden of proof on the prosecution would differ. The Apex Court, further, held that the accused is called upon to explain as to how the amount was found in his possession and the foundational facts must be established by the prosecution. While invoking the provisions of Section 20 of the P.C. Act, 1947, the court is required to consider the explanation offered by the accused only on the tough stone of preponderance of probability and not on the proof beyond all reasonable doubt. The same principles apply to a case under the old Prevention of Corruption Act.

7. Applying the aforesaid ratio to the case in hand, this Court is to see whether there was any demand for the bribe money or not. In this connection, the findings of learned Special Judge, viz., at Paragraph-9 of his judgment require careful consideration. It reads as follows.

“ 9. xxx.... On a careful perusal of the charge report, it shows that item no.29 is the file regarding refund of security deposit. The name of the depositor is not indicated against this item. Similarly, Sl. 121 also relates to refund of security deposit of 1979 which cannot be concerned in this case as the firm of the complainant applied for refund of his security deposit in 1982. There is another item pertaining to refund of security deposit of 11/66 and 6/67 at sl. no.89. This also cannot relate to p.w.4. There is no other item pertaining to refund of security deposit in respect of the storage agent. Thus sl. no.29 might be the file in all reasonable probabilities concerning the firm in question which was made over by Sri Das to the accused. Of course in the absence of the name of the firm or the name of the complainant against sl. no.29, some doubt can be raised in this respect which can be clarified keeping in view the ambiguity of the charge list itself which was not explained by the defence, who has proved the same. Therefore, positive interference can be drawn to the fact that the file in question was made over charge by Sri Das to the accused, p.w.1 deposed that he handed over the documents to the accused on 24.3.86 for the purpose of audit and this evidence was not whittled down by the defence in any manner. Thus, the accused was dealing with the file and for this reason p.w.4 approached the accused to issue the clearance certificate for processing the matter for refund of the security deposit cannot be disbelieved which is a circumstance to show that the accused might have the occasion to demand Rs.1000/- from p.w.4 to do his work.” (underlined to emphasise)

8. From the use of expressions the like “might be the file” and “the accused might have the occasion to demand of Rs.1000/- from P.W.4” reveal that the learned Special Judge did not believe that the prosecution has proved the

allegation that the accused was handling the concerned file in which the refund of money is to be effected and that there is no proof that he demanded money in pursuance of such handling of file to do the work of the complainant.

9. So far as the question of acceptance of bribe money is concerned, it is appropriate to look into the evidence of the decoy and the over-hearing witness. P.W.4 is the decoy or complainant himself. He has stated regarding the demand of bribe by the accused and his bargain to pay Rs.600/-. Thereafter, the complainant reported to the Vigilance Inspector and subsequent events relating to the pre-trap arrangements took place. As far as the trap is concerned, the witness stated in cross examination that when he reached along with the over-hearing witness to the room of the accused, the accused was alone present in his room. He further stated that he entered inside the room of the accused and P.W.3 stood near the door, outside the room. He further stated that when he reached the room, the accused shook hand with him and told him that he came. The witness further states that he told the accused that he brought Rs.600/-, as per the previous talk but the accused declined and insisted for payment of Rs.1000/- at a time. The witness, however, stated in cross examination that he kept Rs.600/- on the table of the accused but the accused declined to receive the same as it was less than Rs.1000/-. The witness further stated that the accused came out of his room and two to three minutes thereafter he entered inside his room. Then, he called the witness to come and see the position of the file. Both of them went to accounts section of the office. Then other members of the raiding party came near them. The I.O. gave his identification and that of the members of raiding party. The I.O. challenged the accused that he has received Rs.600/- as bribe from the complainant and asked the accused to produce the same. At that stage the accused denied the allegation. The I.O. took the hand-wash of the

accused, which turned pink rose. The accused however denied to have received the same. On query, the witness told the I.O. that he kept money on the table under the table cloth and the same was recovered from the table of the accused. Thereafter, the I.O. prepared seizure list and seized security papers and cash. The prosecution cross-examined the witness under Section 154 of the Indian Evidence Act treating him to be a hostile witness. The statement of the witness has been confronted to him. However, he denied to have made statement before the I.O. that he gave money to the accused.

10. It is apparent from the evidence of P.W.3 that he stated that after his arrival at the C.S.O. office along with P.W.4, they went to the room of the accused. The complainant entered inside the room of the accused and the witness remained present at the entrance of that room. P.W.3 stated that he was standing at a distance of six cubits from the table of the accused. The witness further stated that the complainant asked about his file with the accused and thereafter the accused came outside the room for two minutes. The complainant kept cash of Rs.600/- on the table of the accused below the table cloth. The accused entered inside his room. Thereafter, the witness gave signal by robbing his head in his left hand. At that time, the members of the raiding party arrived at the spot and the complainant and the accused were going to the verandah of the office. The Inspector of Vigilance challenged the accused and arrested him. This witness has also been treated to be a hostile witness to the prosecution and has been cross-examined under Section 154 of the Indian Evidence Act.

11. Thus, a bare reading of the evidence of these important witnesses, it is apparent on the record that the accused did not accept money from the complainant. The complainant has positively stated, which is corroborated by P.W.3, that the

complainant kept the bribe money under the table cloth of the desk of the accused. Therefore, the second ingredient appears not to have been proved beyond all reasonable doubts. The learned Standing Counsel however argued that since the hand-wash of the accused turned pink when dipped with sodium carbonate solution, the prosecution case should be believed regarding his acceptance of bribe money from the complainant. In this regard, the defence has put forth a stand that after preparing the trap when they were proceeding to CS Office on the way the complainant purchased betel and inadvertently he put his hand inside chest pocket where the tainted currency notes were kept. Thereafter, he brought out Rs.1 from the back side of pocket of his pant and purchased the betel. It is also consistently stated by the complainant that after arrival at the office he shook hand with the accused and that he handed the files that were placed on the table of the accused. There appears to be a reasonable explanation regarding the fact of phenolphthalein test. In this regard, the learned counsel for the appellant relies upon the reported case of ***State of U.P. Vs. Jagadish Singh Malhotra***, (2001) 20 OLR (SC) 507, wherein at paragraph-8, the Hon'ble Supreme Court has held that:

“8. Insofar as the phenolphthalein test is concerned, we find that the explanation given by the respondent for presence of crystals of phenolphthalein on his hands, which were washed in a solution of sodium carbonate, and the solution had turned pink, is quite plausible. Categorically denying the handling or receipt of the tainted currency notes, he stated that he shook hands with the officers and the phenolphthalein crystals could have come on to his hands during that time. This factor becomes probable, when we find that witnesses examined at the trial are interested witnesses who may have a reason to falsely implicate the respondent, who had been challenging their vehicles on various grounds. x x x ”

12. The reported decision lays down that when a plausible explanation is put forth by the defence, which is to be considered in the touch stone preponderance

of probability, the trial court should not reject the same on the ground that it is not proved beyond all reasonable doubt.

13. In this case, as far as this explanation is concerned, the learned Special Judge has entered into a conjecture by holding that if the currency notes were kept in the chest pocket of the complainant and the trap was laid, the accused would have been kept under surveillance by the vigilance staff and the magistrate. The learned Special Judge, further, entered into a conjecture holding that in all reasonable probability the vigilance staff would not have freely let out P.W.4 to take 'paan'. It is further held by him that if at all the accused want betel, the same could have been purchased by the vigilance staff. This approach of the learned Special Judge, Vigilance is contrary to established tenets of law. The trial court has to accept the evidence as led before him instead of entering into conjectures and put his own opinion on the same when the same is not stated by any of the witnesses.

14. Thus, in the case as there is failure of proof, beyond reasonable doubt regarding the demand of bribe money by the accused and acceptance of the same by him, the prosecution case has failed to prove the guilt of the accused beyond all reasonable doubt. It is also pertinent to take note of the fact that the money was admittedly recovered from under the table cloth of the accused's office table.

In that view of the matter, the appeal succeeds. The judgment of conviction and order of sentence dated 28.03.1990 passed in T.R. Case No.2 of 1987 are hereby set aside. The accused is not found guilty and is set at liberty if his detention is not required in any other case. The bail bonds be cancelled.

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S.K. Mishra,J.