THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO. 5 OF 2020

Sunil Achyutrao Thete .. Appellant

Versus

The State of Maharashtra .. Respondent

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Mr.Sudeep Pasbola with Mr.Ayush Pasbola i/b Sandeep Kumar Singh for the applicant.
Mr.S.R. Agarkar, APP for the State.
PI Rajesh Jagade from ACB Thane present.

CORAM: BHARATI DANGRE, J.
DATED : 20th OCTOBER, 2023

JUDGMENT:-

1 Criminal Revision Application is filed by the applicant who is charged for an offence punishable u/s.7, 12, 15, 13(1)(d) r/w 13(2) of the Prevention of Corruption Act in C.R.No.02/2015 registered with Shahapur police station.

He preferred an application for discharge before the Sessions Court at Kalyan which was rejected on 18/9/2019, and being aggrieved by the same, the applicant has approached this Court.

Tilak

I have heard Advocate Sudeep Pasbola for the applicant and Shri S.R. Agarkar, the learned APP for the State.

2 The prosecution case can be culled out as under :-

At the relevant time, the original complainant Shri Manik S. Pawar was working with M/s.R.V. Construction Company. The tender of the said Company was accepted by the Government for the work of construction of a road in Mouza Malegaon, Kudshet Shirgaon.

On 27/12/2014, when the said work was going on, Shri Thete, R.F.O seized the machinery and stopped the said work, stating that the work is being carried out in Malegaon, Kudset Forest Area/limit.

Thereafter, when the original complainant contacted Shri Thete, R.F.O in his office, he initially demanded Rs.1 lakh, and after negotiation, he agreed to accept Rs.75,000/- from him, for allowing to restart the said work of construction of road. Out of the said amount of Rs.75,000/-, Shri Thete, R.F.O accepted Rs.15,000/- from the original complainant on 27/12/2014 and asked him to bring balance amount of Rs.60,000/- within two days.

Not willing to offer this amount on 30/12/2014, the complainant lodged a complaint with the office of A.C.B Thane.

Thereafter, during the verification of demand, it was revealed that Shri Thete, R.F.O demanded the said amount of

bribe from the original complainant, in presence of panch witness, and asked him to give the said amount to Shri Padwal, Forester. Verification panchnama was drawn accordingly.

Pursuant to this, the trap was arranged on 31/12/2014. On completing pre-trap formalities, a pre-trap panchnama was drawn, in which number of the currency notes which were to be used as bribe, were noted.

On the day of trap, Shri Thete, RFO asked the complainant to give the bribe amount to one Shri Padwal, Forester. Thereafter, when the complainant tried to give the bribe amount to Shri Padwal, Forester, he asked the complainant to give the said amount to Shri Kudav, Forester Guard, who in turn asked the original complainant to hand over the same to one child, who was accompanying with Shri Kudav, aged between 12-13, at Dhasai Shenwar Road. However, since the original complainant did not give amount to the said child, Shri Kudav, Forest Guard suspected something and therefore, he left the said spot with said child. Hence, there was no acceptance of gratification and the trap was withdrawn.

After due investigation, FIR No. 2/2015 came to be registered at Shahapur police station against the aforesaid accused public servants for the offences punishable under Section 7, 12, 15, 13(d) read with 13(2) of the Prevention of Corruption Act, 1988.

3 The investigation was conducted in the said C.R. and on recording the statements of the witnesses, the charge-sheet came to be filed. After filing of the charge-sheet, on 14/3/2016, the Director General of ACB, Maharashtra State, Mumbai, requested the Principal Secretary, Revenue and Forest Department, to accord sanction u/s.19 of the Prevention of Corruption Act, 1988, which is a necessary requirement before prosecuting a public servant.

By a note put up on 13/4/2016, prepared by the Section Officer of the Revenue and Forest Department, it was expressly opined that in the present case, the trap laid was not successful as bribe amount/demanded was not accepted, and since there is no material to establish that Shri Thete or other public servants have received the illegal gratification by way of bribe, the offence came to be registered against them after delay of 40 days, by Anti Corruption Bureau (ACB), only for demand of bribe and that too, it was based on a conversation between the complainant and the Officers, of which a script was prepared. However, the analysis of the voice recorded was not included in the papers.

4 Considering the statement of Shri Thete given to the ACB, to the effect that on 27/12/2014, while he was on patrolling duty, he had given orders to Shri Padwal, as he noted dumper roller and JCB on the spot and while the action was underway, since the said machinery was removed, a complaint to that effect was already filed by the Forester Shri Padwal in Kinavli police

station. However, the complainant Shri Pawar, at whose instance the ACB case was registered, alleged that he received threats for confiscation of the said machinery and hence, prima facie, it appear that in order to escape the lawful action, Shri Pawar, had filed a complaint with ACB.

A clear opinion is, therefore, expressed by the Revenue and Forest Department, that the matter is not fit for grant of sanction, but the necessary remarks were sought from the said Law and Judiciary Department to have clarity on the issue.

5 When the file was moved before the Legal Advisor cum Joint Secretary of the Law and Judiciary Department, on perusal of the papers as well as the noting of the Administration Department, which was of the view that prima facie, it is not a fit case for sanction, the Law Department passed the following remarks :

> *"Considering the facts and circumstances of this particular case and the offence is registered against the accused person, it appears to be necessary to peruse the report of the Forensic Science Laboratory regarding the voice sample of the accused public servants, so as to enable this Department to give an appropriate opinion to Revenue and forest Department in this matter. However, it appears that the said report is not availbal in the instant file. Hence, in the first instance, the Revenue and Forest Department is requested to obtain the said report immediately from the ACB and thereafter, refer the present matter to this Department for opinion on the point of according sanction to prosecute the said accused public servants"*

6 Subsequent to the noting, on obtaining the analysis of the recorded questioned Voice exhibits from the Forensic Department, subsequent to the spectographic analysis, where it was opined that the question voice exhibits of speaker marked 'Exhibit-1' and 'Exhibit-2' are similar to the specimen voice exhibit of the speaker marked 'Exhibit-3/1' (said to Shri Sunil Achyutrao Thete).

The voice sample of Pandurang Padwal and Ramesh Kudav also yielded similar results.

7 On receipt of this report of voice analysis, once again, the Revenue and Forest Department, opined that the report of the analysis of the voice sample reflected a 'similarity' and as per British dictionary, the word 'similar' is showing resemblance in qualities, characteristics or appearance alike, but not identical. It was, therefore, opined that no conclusive evidence is forwarded by the Forensic Analysis Laboratory, establishing the demand of bribe being in the voice of Shri Thete. However, once again, the matter was made over to the Law and Judiciary Department for necessary comments.

8 Upon this noting put up before the Law Department, an opinion was expressed that the interpretation of the word 'similar' is not proper and fair, as synonym of word 'similar' is 'same'. Apart from this, it was opined that the C.A. report can be used only as a corroborative piece of evidence, and it is a matter of

trial and arguments, and though the Revenue and Forest Department appeared to have examined the matter in detail, the Sanctioning Authority is not required to go through each and every detail of investigation papers placed before it concludes on existence of a *prima facie* case against the person to be prosecuted.

Clause 2.3 of the Central Vigilance Manual was quoted to opine that even a case might lead to an acquittal, but this aspect, will not be a sufficient ground for withholding the sanction and normally the sanction for prosecution should be accorded even if there is some doubt about it's result, as whether the evidence available is adequate or not, is a matter for the Court to consider and decide.

9 With this advice/opinion, the Revenue and Forest Department was directed to place the matter/entire investigation papers before the Sanctioning Authority, so as to enable it to take an appropriate decision by applying it's mind, whether *prima facie* material exist to constitute an offence against the accused persons and thereafter, to take a conscious decision to accord the sanction.

Once again, the Forest Department was in confusion, since the Law and Judiciary Department did not give it's clear view, as to whether sanction shall be granted or not, only on the basis of the report of the analysis of voice sample and expressed it to be so.

The Law and Judiciary Department, this time conveyed it's opinion, in clear words, to the following effect :-

> *"Para 7 and 8 of the aforesaid U.O.R dated 16/7/2016 had already mentioned the same facts. The views of this department, as stated in the aforesaid UOR are correct. In short, prima facie evidence is available on record to prosecute Shri Thete, RFO and ors, in respect of the aforesaid offence."*

10 On receipt of such comprehensible opinion from the Law Department, the Revenue and Forest department, granted permission to accord sanction to prosecute Shri Sunil Thete, RFO, Ghasai Forest Office, Shri Pandurang Padwal, Forestor and Shri Ramesh Kudav, Forest Guard Shenva Forest Officer in the Anti Corruption matter.

In it's noting under the signature of Secretary, Forest Department, it is recorded that the permission to prosecute the public servants is accorded subsequent to the opinion of the Law and Judiciary Department and, thereafter, the draft of the sanction order was prepared and placed before the Law and Judiciary Department for approval.

The draft sanction order was examined in the light of the file/papers made available by the Forest department and some corrections/changes were made in the draft sanction order and the Schedule attached with it so that the order of sanction fulfill the ingredients of Section 13(1)(d) r/w Section 13(1)(2) of the Prevention of Corruption Act, 1988, and the draft was approved.

Certain instructions were also issued to the concerned Administrative Department to verify the correctness of the facts stated in the draft sanction order and also to verify the investigation papers in connection with the instant offence, when placed before the competent sanctioning authority.

11 Upon the draft having been approved by the Law and Judiciary Departments, the sanction order was issued on 2/1/2017 by the Joint Secretary of the Revenue and Forest Department, in consonance with Section 19(1)(b) of the Prevention of Corruption Act, 1988, and held that accused persons were liable to be prosecuted u/s.7, 13(1)(d) r/w Section 13(2)(a), 12 and 15 of the Prevention of Corruption Act, 1988.

It is this sanction, which was pleaded to be invalid and a discharge was sought by the applicant on the ground that it is not a valid sanction, meeting the eyes of law.

12 The legal position regarding the importance of sanction u/s.19 of the Prevention of Corruption Act, is too clear to admit equivocation. The Act forbids taking of cognizance by the Court against public servants, except with the previous sanction of an Authority, competent to grant such sanction in terms of clauses (a), (b) and (c) of Section 19 of the Act. The question regarding validity of such sanction can be raised at any stage of the proceedings, and the competence of the Court, trying the accused so much depends upon the existence of a valid

sanction. In case the sanction is found to be invalid, the Court can discharge the accused, relegating the parties to a stage where the Competent Authority may grant a fresh sanction for prosecution in accordance with law. If a trial proceeds, despite the invalidity of the sanction order, it shall be *non-est* in the eyes of law, though it shall not forbid a second trial for the same offences upon grant of valid sanction for such prosecution.

It is a trite position of law as propounded in *State of Mizoram Vs. Dr. C. Sangnghina,*[1] that if a sanction is issued by an authority not competent to grant the sanction, and when the respondent was discharged, before commencement of trial, on ground of the sanction, there is no impediment in filing fresh charge-sheet and this would not attract Article 20(2) of the Constitution of India and Section 300 of the Code of Criminal Procedure.

Grant of valid sanction is a *sine qua non* for prosecuting a public servant. The validity of sanction would depend upon the competency of the Officer to grant sanction and application of his mind to the material placed before the Sanctioning Authority and consideration of the relevant facts and material evidence.

Consideration implies application of mind. The order of sanction must ex-facie disclose that the Sanctioning Authority had considered the evidence and other material

1 *2018(4) Crimes 283 (SC),*

collected during investigation and placed before it. This fact is also permitted to be established, through extrinsic evidence, by placing relevant files before the Court, to demonstrate that all relevant facts were considered by the sanctioning authority, before it either grant the sanction or refuse the same.

In short, the Sanctioning Authority shall apply it's own independent mind, for generation of a genuine satisfaction, whether the prosecution has to be sanctioned or not. When it is said that there should be application of mind, to the facts and the material by the Sanctioning Authority, it necessarily imply that the power bestowed, shall be exercised by the authority by examining the *pros and cons* of the matter. What is expected of the Authority is, it must consider the relevant facts and material placed before it, apply it's mind and take a decision, which it deems appropriate. At times, when it is competent for an authority to exercise a discretion, there shall be no fetters imposed upon it by adopting any fixed rules of policy or decision to be invoked in all cases coming before it, and the discretion may not be guided by any rigid rules of it's exercise, as the Authority shall be given a free hand, so that it takes a decision, with open mind, based on the facts before it.

It is well accepted, that while exercising the discretion, an Administrative Authority is expected to act in a fair and impartial manner, nevertheless having an existing general policy, it shall not preclude him from fairly judging all the issues,

which are relevant to each individual case, as it is placed before it for a decision, but when the decision to be taken by applying one's mind, is shadowed by super imposing someone else's decision and the Authority concerned does not apply it's mind and does not take action on it's own judgment, though it was expected to do so, and in law, this would amount to non-exercise of power, by the Authority and such action is liable to be held as bad.

13 The doctrine 'Action under dictation, is explained Wade, in Wade & Forsyth Administrative Law as below :-

> *"Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with some one else, or may allow some one else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them."*

As per Halysbury law of England[2],, the doctrine is understood as under :-

> *"A body entrusted with a statutory discretion must address itself independently to the matter for consideration. It cannot lawfully accept instructions from, or mechanically adopt the view of, another body as to the manner of exercising its discretion in a particular case, unless that other body has been expressly*

2 Vol.I, (4th Edn), para 31, 33

empowered to issue such directions or unless the deciding body or officer is a subordinate element in an administrative hierarchy within which instructions from above may properly be given on the question at issue."

14 It is thus the settled proposition of law that if a power is to be exercised by an Authority, it shall not permit it's exercise, to be influenced by the dictation of others, as it would amount to abdication and surrender of it's discretion and power and if it is so done, it is not the Authority's discretion which is exercised but it is predisposition by someone else. If an Authority permits it's decision to be over shadowed by any another body, or authority, then, it is not it's decision and will fall foul of the power conferred upon the 'Authority'.

An exception to the above, is when an advice or assistance is sought, and at times, an authority may be entitled to take into consideration the advise tendered by a public body set up for this purpose, and one authority may be entitled in bonafide exercise of his discretion to accept that advice, and act upon it, though he would have acted differently if this important factor had not been present in his/it's mind, when a decision was reached, and this contingency was contemplated by the Apex Court in case of *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*[3].

3 AIR 1952 SC 16.

15 It is crystal clear that an Authority, who is conferred with a power to take a decision and exercise it's discretion, cannot act at the dictation of another, though it is open to take into account advice or assistance, but a decision taken is it's own.

Similarly, when the power conferred on an authority is expected to be exercised after applying it's mind to the facts and circumstances of the case, if it is not complied with, then, there is clear non-application of mind, as the Authority may act mechanically, without due care and caution and on failure to exercise it's discretion, the action taken, would be rendered bad in law. The application of mind may be well discerned from the order itself or from the record contemporaneously maintained, and such disclosure is best done by the reasons supporting the passing of an order or a decision taken.

16 Section 19 of the Prevention of Corruption Act, 1988 which contemplate previous sanction before prosecuting a public servant, expect application of mind by the competent authority to the facts of the case, as also to the material and evidence collected during investigation, and while granting a sanction, the Sanctioning Authority is expected to apply it's mind independently, to the material placed before him, before a conclusion is reached as to whether the prosecution has to be sanctioned or not.

17 The Apex Court in case of *Mansukhlal Vithaldas Chauhan Vs. State of Gujarat*[4] , has observed as under :-

> *"19 Since the validity of "sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, it necessarily follows that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it to take a decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have been affected by any extraneous consideration. If it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution"*

Dealing with a scenario where a direction was issued by the High Court to the Secretary of the State to grant sanction, it was held that it would not amount to valid sanction and the relevant observations of Their Lordships are most aptly applicable to this case and I must reproduce the same.

> *"32 By issuing a direction to the Secretary to grant sanction, the High Court closed all other alternatives to the Secretary and compelled him to proceed only in one direction and to act only in one way, namely, to sanction the prosecution of the appellant. The Secretary was not allowed to consider whether it would be feasible to prosecute the appellant; whether the complaint of Harshadraj of illegal gratification which was sought to be supported by "trip" was false and whether the prosecution would be vexatious particularly as it was in the knowledge of the Govt. that the firm had been black-listed once and there was demand for some*

4 (1997)7 SCC 622

amount to be paid to Govt, by the firm in connection with this contract. The discretion not to sanction the prosecution was thus taken away by the High Court.

33. The High Court put the Secretary in a piquant situation. While that Act gave him the discretion to sanction or not to sanction the prosecution of the appellant, the judgment gave him no choice except to sanction the prosecution as any other decision would have exposed him to action in contempt for not obeying the mandamus issued by the High Court. The High Court assumed that role of the sanctioning authority, considered the whole matter, formed an opinion that it was a fit case in which sanction should be granted and because it itself could not grant sanction under Section 6 of the Act, it directed the Secretary to sanction the prosecution so that the sanction order may be created to be an order passed by the Secretary and not that of the High Court. This is a classic case where a Brand name is changed to give a new colour to the package without changing the contents thereof. In these circumstances the sanctions order cannot but be held to be wholly erroneous having been passed mechanically at the instance of the High Court".

18 Mr.Pasbola, the counsel for the applicant has relied upon decision of the Apex Court in case of State of *Himachal Pradesh Vs. Nishant Sareen*[5], where the facts reveal that upon the completion of investigation, Vigilance Department sought sanction u/s.19 to prosecute the respondent and the Principal Secretary (Health) found no justification in granting sanction and refused it. The Vigilance Department again took up the matter with the Principal Secretary (Health) and this time, the competent authority reconsidered the matter and granted sanction to prosecute the respondent, though no fresh material was made available for further consideration.

5 *(2010) 14 SC 527*

In these backdrop facts, it was held that there is no express provision in Section 19 of the Prevention of Corruption Act, or for that matter, Section 197 of the Code regarding review or reconsideration of the matter by the sanctioning authority, once such power is exercised.

In para 12 and 13, the scope of the exercise of the power, or at a subsequent stage, is highlighted and it reads thus :-

> *"12 It is true that the Government in the matter of grant or refusal to grant sanction exercises statutory power and that would not mean that power once exercised cannot be exercised again or at a subsequent stage in the absence of express power of review in no circumstance whatsoever. The power of review, however, is not unbridled or unrestricted. It seems to us sound principle to follow that once the statutory power under Section 19 of the 1988 Act or Section 197 of the Code has been exercised by the Government or the competent authority, as the case may be, it is not permissible for the sanctioning authority to review or reconsider the matter on the same materials again. It is so because unrestricted power of review may not bring finality to such exercise and on change of the Government or change of the person authorised to exercise power of sanction, the matter concerning sanction may be reopened by such authority for the reasons best known to it and a different order may be passed. The opinion on the same materials, thus, may keep on changing and there may not be any end to such statutory exercise.*
>
> *13 In our opinion, a change of opinion per se on the same materials cannot be a ground for reviewing or reconsidering the earlier order refusing to grant sanction. However, in a case where fresh materials have been collected by the investigating agency subsequent to the earlier order and placed before the sanctioning authority and on that basis, the matter is reconsidered by the sanctioning authority and in light of the fresh materials an opinion is formed that sanction to prosecute the public servant may be granted, there may not be any impediment to adopt such course.*

19 In the present case, Mr.Pasbola has invited my attention to the sequence of events, as regards the grant of sanction and I have already referred to the manner in which the file travelled from the Revenue and Forest Department to the Law and Judiciary Department back and forth.

The Forest Department i.e. Department competent to grant sanction was of the clear opinion that no sanction could be granted, as there was no proof of acceptance of the bribe amount and the factor of 'Demand' itself was doubtful, since there was no conclusive proof on analysis of the voice of the applicant.

The matter was then referred for opinion, to the Law and Judiciary Department, which sought the report of the voice analysis from the Forensic Science Laboratory, and on its receipt the Forest Department was not still satisfied about the grant of sanction, since the conclusion drawn by the Laboratory was about similarity in the voice, but it did not conclusively establish that the voice in the conversation seeking demand was that of the applicant.

Once again, the file was forwarded to the Law Department and it reiterated its earlier view that while granting sanction, the possibility of conviction or acquittal shall not be looked into and it directed that the sanction shall be granted.

Acting upon the dictate of the Law and Judiciary Department, the Forest Department i.e. the authority competent

to grant sanction for prosecution noted, that since the Law Department is of the view that *prima facie* evidence is available to prosecute Shri Thete, RFO and others, in respect of the aforesaid offence, the Revenue and Forest Department, prepared a draft sanction order for approval and on it being approved by the Law Department, the sanction order was issued, necessarily without application of mind by the competent authority.

20 Validity of a sanction would depend upon application of mind on part of the authority which is expected to grant sanction. The sanction order shall suffer from perversity, if it take into consideration extraneous and irrelevant material and ignore the relevant one, then, the sanction cannot be said to be valid one. It is equally well settled that the superior courts cannot direct the sanctioning authority, either to grant sanction or not to do so. The legality and/or validity of the order granting sanction is subject to review by the criminal courts, and an order granting sanction if suffer from perversity, it is liable to be quashed and set aside. Apart from this, if it is demonstrated that the order suffers from non-application of mind, the Court may grant indulgence and set aside such an order.

Considering the significant importance of the grant of sanction in prosecuting the public servant, in the present case, the sanctioning authority i.e. the Department of Revenue and Forest has acted in a perfunctory manner and though it formed an opinion that the prosecution of the applicant is not warranted and

expressly opined so, even after it received the report of the voice analysis, but it is only at the dictum of Law Department, to grant the sanction to prosecute the applicant and other public servants, the sanction order was issued.

The order so issued in such a fashion cannot stand the scrutiny of law as it lacks application of mind and thus loses it's validity.

Mr.Pasbola is perfectly justified in advancing his submission that the prosecution based on such sanction order is nothing but an abuse of process of law, and since there is no sufficient ground for proceedings against the applicant in absence of a valid sanction, he is entitled for discharge.

21 Since the impugned order has failed to take into consideration this significant and important aspect of the matter, and refused to discharge the applicant, the order dated 18/09/2019 cannot be sustained and is liable to be quashed and set aside.

As a consequent, Revision Application is allowed and the applicant is discharged in Special case No.2/2015, which charged him for committing offence under Sections 7, 12, 15, 13(1)(d) r/w 13(2) under the Prevention of Corruption Act, 1988.

(SMT.BHARATI DANGRE, J)

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