A. Sivaprakash vs State Of Kerala on 10 May, 2016

Equivalent citations: AIR 2016 SC 2287, 2016 (12) SCC 273, 2016 CRI. L. J. 2654, (2016) 2 CURCRIR 312, (2016) 3 KER LJ 227, (2016) 3 JLJR 117, (2016) 3 BOMCR(CRI) 140, (2016) 2 CAL LJ 143, (2016) 2 CRIMES 249, 2016 CRILR(SC MAH GUJ) 467, (2016) 162 ALLINDCAS 116 (SC), 2016 CRILR(SC&MP) 467, (2016) 2 CRILR(RAJ) 467, (2016) 5 SCALE 53, (2016) 2 UC 1225, (2016) 2 ALD(CRL) 407, (2016) 3 ALLCRILR 655, (2016) 2 ALLCRIR 1918, (2016) 64 OCR 492, (2016) 2 RECCRIR 1002, (2016) 94 ALLCRIC 954, (2016) 3 MAD LJ(CRI) 97, (2016) 164 ALLINDCAS 145 (SC), 2016 (3) KLT SN 109.1 (SC), AIR 2016 SUPREME COURT 2287

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Bench: Prafulla C. Pant, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 131 OF 2007

A. SIVAPRAKASH	.....APPELLANT(S)	
VERSUS		
STATE OF KERALA	.....RESPONDENT(S)	

J U D G M E N T

A.K. SIKRI, J.

Four persons were implicated as accused persons in FIR registered on 09.09.1993 under Sections 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as the 'PC Act') and Section 409 read with Section 34 of Indian Penal Code ('IPC'). After investigation, when the chargesheet was filed on 19.01.1998, one more person (who is the appellant before us) was also added as an accused. Chargesheet was filed under Section 13(2) read with 13(1)(d) of the PC Act and under Sections 468 and 471 read with Section 34 of IPC. Charges were framed by the trial Court against the accused persons. Matter went on trial and resulted in acquittal of A-2 and A-3 from all the charges and conviction of A-1, A-4 and A-5 (i.e. the appellant) under Sections 13(2) read with 13(1)(d) of the PC Act. These accused persons i.e. A-1, A-4 and A-5 were, however, acquitted of the

charges under Sections 468 and 471 read with Section 34 of IPC.

No appeal was filed by the State against the acquittal of A-2 and A-3. A- 1, A-4 and A-5 filed appeals in the High Court challenging their conviction. A-1 and A-4 passed away during the pendency of their appeals and, therefore, those appeals have abated. Thus, it is only the appellant who remains in the fray. His appeal was taken up by the High Court for hearing and was ultimately dismissed by the High Court vide the impugned judgment dated 25.05.2006. Thus, in this appeal, we are only concerned with A-5 (the appellant). With these introductory remarks, we advert to the meat of the matter.

The appellant was working as Assistant Engineer in the Public Works Department (PWD) attached to Arudai, NES Block within the jurisdiction of which Vandiperiyar Panchayat situates. The said Panchayat decided to construct the first floor of the existing high school building situated in the Panchayat area, by including the work under Jawahar Rozgar Yojana (JRY). As per the procedure followed under the D.R.D. Scheme the work was included in the JRY to be carried out by a nominee selected from the beneficiary of the work. Accordingly, one Rajarathinam (A-3) was selected as nominee, awarding the said work of construction. Appropriate agreement was executed by him. The total estimate was for Rs. 4 lakhs which was to be met out of the fund of JRY and of Panchayat. Payment for the work was to be effected as per the guidelines issued by the Government including Ex. P/17 which provided that the Panchayat could make advance payment upto 50% of the estimate amount. It was also mentioned therein non-adherence to the aforesaid procedure would be termed as irregular.

The case of the prosecution was that all the accused persons colluded together and A-1, A-2 and A-4 disbursed the amount to A-3, the nominee, on the basis of the 'stage certificate' which was issued by A-5, the Assistant Engineer in respect of the part completion of the work. Ex. P/16(a) was treated as the stage certificate, which in fact is the letter dated 9.6.1992 wherein the appellant had certified that 25% of the work in question had been completed. Payments were effected to the nominee on 25.03.1992, 21.04.1992, 16.05.1992 and 21.10.1992 at the rate of Rs.25,000/- , Rs. 50,000/-, Rs.7,000/- and Rs. 1 lakh. Payments were effected by Ex.P/7, P/10, P/12 and P/14 respectively. The prosecution alleged that the last and largest of these payments, i.e. Rs. 1 lakh, was made on the basis of purported 'stage certificate' [Ex.P/16(a)] issued by the appellant. It was alleged that the false stage certificate was issued as 25% of the work had not been completed. In this way, the appellant abused his official position to obtain pecuniary advantage.

In nutshell, the gravamen of the charge against the appellant is that while working as the Assistant Engineer, he issued stage certificate in respect of the contract that was awarded to A-3 and on the basis of these certificates, payment to the extent of 50% of the contract value was received by A-3. As per the prosecution, that was the false certificate which did not depict the correct progress or the position of the work. This was surfaced on the inspection of the work which was carried out by PW-2 on the direction of Deputy Superintendent of Police (Vigilance) wherein it was found that the work completed was only to the extent of Rs.42,649.89, that too as on the date of inspection which was much after the date on which stage certificates were issued by the appellant. Since the contract value was Rs.4 lakhs, even on the date of inspection only 10% work was completed.

Entire case of the prosecution rested on Ex.P16(a) coupled with the Inspection Report (Ex.PW2). On the basis of the aforesaid documentary evidence produced on record, the trial court came to the conclusion that in issuing the certificate (Ex.P/16(a)), the appellant had abused his official position only to enable either for himself or for others to obtain peculiar advantage and, therefore, guilty of offence punishable under Section 13(1)(d) of the PC Act. Trial Court, accordingly, sentenced the appellant to undergo rigorous imprisonment for the period of two years and to pay fine of Rs.75,000/- and in default to undergo rigorous imprisonment for a further term of 1½ years under Section 13(2) read with Section 13(1)(d) of the PC Act.

Challenging the conviction and sentence imposed by the trial court, the appellant in his appeal to the High Court contended that there was no evidence on record to reveal that payments were made on the basis of the said letter dated 9.6.1992 [Ex.P/16(a)], wrongly termed as 'stage certificate'. It was also argued that this letter was not the basis for making payments as payments were effected either before or after the date of Ex.P/16(a). It was also argued that payments were not dependent upon the stage at which the work was and the advance payment upto 50% could be released at the start of the work. Itself, as per the procedure laid down.

The High Court did not find any merit in the aforesaid arguments of the appellant. It concurred with the findings of the trial court and held that there was hardly any work done at the spot by A-3 when he was released the payments. Ex.P/2 which was the report prepared by PW-2 on 19.07.1994 showed that only Pillar work had been completed and the cost of the said work was to the tune of Rs.42649.89. The High Court accepted the contention of the appellant that payments of Rs.25,000/-, Rs.50,000/- and Rs.7,000/- were made to A-3 before the issuance of Ex.P/16(a). However, it held that after the issuance of the said certificate, an amount of Rs.1 lakh (largest among the payments made) was released in favour of A-3 on 21.10.1992. The High Court also conceded the position that Ex.P/16(a) could not be termed as 'stage certificate' as it was accepted even by PW-4 that it was not a stage certificate. Notwithstanding that, the High Court opined that the appellant being a responsible officer knew how the stage certificate is to be issued. In spite thereof he issued Ex.P/16(a) which was the letter to the Panchayat informing the Panchayat that the percentage valuation cost of completion of one work was 75% (with which we are not concerned) and that of other work, it was 25% and this information was obviously furnished for the purposes of releasing payment to A-3. From this, the High Court concluded that the appellant intended that payment be released on the basis of said certificate and writing of this letter (allegedly termed as certificate) amounted to abusing his official position. These are the reasons given by the High Court in dismissing the appeal of the appellant.

Mr. R. Basant, learned senior counsel appearing for the appellant, made a vehement plea that the trial court as well as the High Court has totally misread the circular pertaining to JRY under which such payments are to be released and a proper reading of the provisions of the said circular would manifest that the appellant had no role in making the payment, by the Panchayat, to A-3. He referred to the chargesheet and argued that what was stated in the chargesheet was totally different from what was ultimately held against him.

Learned counsel for the respondent, on the other hand, justified the reasoning given by the trial court as well as by the High Court in support of their conclusion.

We have considered the respective submissions with reference to the record.

It is not in dispute that two works were awarded to A-3: one was known as "JRY – consignment semi permanent building in Vandiperiyar" and other was known as "JRY – construction of permanent building in Vandiperiyar". In the present case, we are concerned with release of payments to A-3 in respect of second work contract. As is clear from the nomenclature of these two contracts, they were under JRY. The Commissioner, Village Development, Thiruvananthapuram had issued Circular No. 14514/J.R.Y. 1/91/C.R.D. dated 23.04.1991 which prescribes the procedure for implementation of JRY and contains certain suggestions. Para 2 thereof is relevant for our purposes which mentions about the manner in which 50% of the advance can be released by the Panchayat. It reads as under:

> "2. It was directed that for all works under J.R.Y. contractors shall be avoided and the works shall be directly taken up by the panchayats or by the convenors elected by the consumers. It was directed that the amount for such works will be paid in advance. As per the circular of village Development Commissioner No. 29786/J.R.Y 1/90/CRD dated 23.7.1999, instructions have been issued to panchayats to give necessary funds in advance. By this way preparing bills every now and then can be avoided and the 50% of estimated cost can be given in advance. But such funds have to be sanctioned considering the work in hand in part installments. Otherwise without starting a project work 50% advance expenditure cannot be given in advance. To do so will not be in order. Money required to start a work can be given in advance and as the work progresses according to the work, more funds can be sanctioned. Funds entrusted with the panchayats for the works of JRY are included in the public funds and the panchayats are reminded that unnecessary withdrawals from such funds would tantamount temporary misutilisation of public funds. When 50% of budget work is given as advance and when works are completed, a part bill can be prepared and advance amount can be written off against completed works. Panchayats are further informed that without preparing part bill more than 50% advance payment cannot be allowed and doing so would amount to misutilisation of Government funds." Based on the aforesaid paragraph, submission of Mr. Basant was that it was permissible for the Panchayat to release 50% of the estimated cost of the Project as advance payment, though it was to be sanctioned only after the project/work has started. This Circular, however, mentioned that money required to start the work can be given in advance and as the work progresses, more funds can be sanctioned. He, thus, submitted that release of 50% payment was not contingent upon the stage of the execution of the work, but on the mere start of the work.
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> There appears to be merit in the aforesaid submission of the learned senior counsel. PW-4 who was the Assistant Executive Engineer in his deposition has categorically admitted that in JRY Scheme Work, there is a provision to give advance amount of

50% of work. The total cost of the work in question, for which the payments were made, was Rs. 4 lakhs and 50% thereof comes to Rs. 2 lakhs.

Ex.P/16(a) which is dated 09.06.1992 shows that this letter was written on the request of Panchayat President as it start with the words "as requested by you.....". In respect of work in question, it is averred that "...Also the percentage valuation cost of the JRY construction of permanent building in Vandiperiyar is 25 (twenty five only)." Prior to the writing of this letter, A-3 had already released three payments of Rs.25,000/-, Rs.50,000/- and Rs.7,000/-. Thus, it is nobody's case that those payments were made to A-3 on the basis of any 'stage certificate' or any such letter issued by the appellant. Thus, much before the issuance of Ex.P/16(a), A-3 was given the payment of Rs.82,000/-. As noted above, as per circular dated 23.04.1991, payment could not be made without starting a project/work. It means that as per Panchayat itself, A-3 had started work which resulted in the aforesaid payment. Once the work is started, Panchayat was empowered to release advance to the extent of 50% of the estimated cost, i.e. up to Rs. 2 lakhs. Thus, Panchayat could have made further payment of Rs.1,18,000/- even without Ex.P/16(a). Payment of Rs.1 lakh was made on 09.06.1992, which was well within defined limits.

In this hue, let us consider the nature of Ex.P/16(a). It is issued on the request of Panchayat President. It mentions that "valuation cost" of the said project is 25%. This letter never stated that A-3 had 'completed' 25% work. It only mentioned "valuation cost". A specific plea was raised by the appellant that it was the cost which was mentioned by him and that included the cost of material as well which was brought on site by A-3. High Court rejected this argument which is clearly erroneous. It was equally wrong in terming it as the stage certificate. The High Court wrongly proceeded on the basis that advance payment could be given only on installment basis depending upon the percentage of the work completed. We, thus, are of the opinion that there is no causal connection between release of payment to A-3 and letter Ex.P/16(a).

Section 13(1)(d) of the PC Act reads as under:

"13. Criminal misconduct by a public servant (1) A public servant is said to commit the offence of criminal misconduct,-

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(d) If he,-

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

> (ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or
>
> (iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or" The prosecution has sought to cover the case of the appellant under sub-

clause (ii) and not under sub-clause (i) and sub-clause (iii). Insofar as sub-clause (ii) is concerned, it stipulates that a public servant is said to commit the offence of criminal misconduct if he, by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage. Thus, the ingredients which will be required to be proved are:

> (1) The public servant has abused his position.
>
> (2) By abusing that position, he has obtained for himself or for any other person any valuable thing or pecuniary advantage.

It was not even the case set up by the prosecution that appellant had taken that money from some person and had obtained any pecuniary advantage thereby. It was the obligation of the prosecution to satisfy the aforesaid mandatory ingredients which could implicate the appellant under the provisions of Section 13(1)(d)(ii). The attempt of the prosecution was to bring the case within the fold of clause (ii) alleging that he misused his official position in issuing the certificate utterly fails as it is not even alleged in the chargesheet and not even iota of evidence is led as to what kind of pecuniary advantage was obtained by the appellant in issuing the said letter.

In C. Chenga Reddy & Ors. v. State of A.P., (1996) 10 SCC 193, this Court held that even when codal violations were established and it was also proved that there were irregularities committed by allotting/ awarding the work in violation of circulars, that by itself was not sufficient to prove that a criminal case was made out. The Court went on to hold:

> "22. On a careful consideration of the material on the record, we are of the opinion that though the prosecution has established that the appellants have committed not only codal violations but also irregularities by ignoring various circulars and departmental orders issued from time to time in the matter of allotment of work of jungle clearance on nomination basis and have committed departmental lapse yet, none of the circumstances relied upon by the prosecution are of any conclusive nature and all the circumstances put together do not lead to the irresistible conclusion that the said circumstances are compatible only with the hypothesis of the guilt of the appellants and wholly incompatible with their innocence. In Abdulla Mohd. Pagarkar v. State (Union Territory of Goa, Daman and Diu), (1980) 3 SCC 110, under somewhat similar circumstances this Court opined that mere disregard of relevant provisions of the Financial Code as well as ordinary norms of procedural behaviour of government officials and contractors, without conclusively establishing, beyond a reasonable doubt, the guilt of the officials and contractors concerned, may

give rise to a strong suspicion but that cannot be held to establish the guilt of the accused. The established circumstances in this case also do not establish criminality of the appellants beyond the realm of suspicion and, in our opinion, the approach of the trial court and the High Court to the requirements of proof in relation to a criminal charge was not proper…." We, therefore, are of the opinion that the prosecution has miserably failed to prove the charge beyond reasonable doubt and the courts below have not looked into the matter in a proper perspective. We, thus, allow this appeal and set aside the conviction of the appellant. The appellant is already on bail. His bail bonds shall stand discharged.

……J. (A.K. SIKRI) ……J. (PRAFULLA C. PANT) NEW DELHI;

MAY 10, 2016