N. Bhargavan Pillai (Dead) By Lrs.And ... vs State Of Kerala on 20 April, 2004

Equivalent citations: AIR 2004 SUPREME COURT 2317, 2004 AIR SCW 2797, 2004 CRILR(SC MAH GUJ) 879, 2004 (5) SRJ 465, 2005 SCC(CRI) 142, 2004 (4) SCALE 693, 2004 (5) ACE 63, 2004 (3) SLT 561, 2004 CRI(AP)PR(SC) 374, 2004 ALL MR(CRI) 2221, 2004 (13) SCC 217, (2004) 20 ALLINDCAS 642 (SC), (2004) 2 KHCACJ 397 (SC), 2004 CRILR(SC&MP) 879, (2004) 3 EASTCRIC 60, (2004) 3 SUPREME 357, (2004) 4 SCALE 693, (2004) 2 UC 851, (2004) 4 RECCRIR 488, (2004) 4 ALLCRILR 674, (2004) 2 RAJ CRI C 607, (2004) 2 RECCRIR 641, (2004) 2 BOMCR(CRI) 558, (2004) 49 ALLCRIC 610, (2004) 3 ALLCRILR 178, (2004) 2 CRIMES 415, 2004 CHANDLR(CIV&CRI) 391, (2004) 2 CURCRIR 314, (2004) 2 ALLCRIR 1968, (2004) 2 KER LT 725, (2004) 3 CHANDCRIC 181, (2004) 28 OCR 396, (2004) 19 INDLD 759, 2004 (2) ANDHLT(CRI) 96 SC

Author: Arijit Pasayat

Bench: Doraiswamy Raju, Arijit Pasayat

```
           CASE NO.:
Appeal (crl.)  1262 of 1998

PETITIONER:
N. Bhargavan Pillai (dead) by Lrs.and Anr.

RESPONDENT:
State of Kerala

DATE OF JUDGMENT: 20/04/2004

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
```

J U D G M E N T ARIJIT PASAYAT,J N. Bhargavan Pillai (hereinafter referred to as 'accused') as appellant questioned correctness of the judgment rendered by learned Single Judge of the Kerala High court upholding his conviction under Section 5(2) of the Prevention of Corruption Act, 1947 (in short the 'Act') and Section 409 of the Indian Penal Code, 1860 (in short the 'IPC'). For the offence under the Act, he was sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,00,000/- with a default stipulation of 6 months imprisonment and sentence of one year for the offence under the IPC. Since he died during pendency of the appeal, his legal representatives sought for impletion and have been impleaded.

Accusations which led to trial of the accused are essentially as follows:

> The accused was employed in the Civil Supplies Department in the rank of Assistant Taluk Supply Officer. He was working as Junior Manager on deputation in the Kerala State Civil Supplies Corporation (in short the 'Corporation'), at Kowdiar. While he was functioning as such, by Ex.P-19 order dated 14.4.1983 of the Regional Manager, of the Corporation, Thiruvananthapuram, he was appointed as Unit Manager of the Corporation, Unit Punalur. Pursuant to the orders he took charge as Unit Manager in the Punalur Unit. His 5 years deputation to the Corporation was to be completed on 30.6.1986. But, instead of relieving him, the Corporation had requested the Civil Supplies Department to extend his term of deputation by one year stating that certain liabilities were outstanding. But later, the request for extension of deputation was limited upto 30.11.1986 by Ext.P-38 letter dated 4.11.1986 from the Managing Director of the Corporation to the Director of Civil Supplies, Board of Revenue. By the same letter, the Regional Manager of the Corporation, was directed to relieve the accused to his parent department on 30.11.1986 itself. Pursuant to the direction, the Regional Manager issued Ext.P-20 order dated 29.11.1986 relieving the accused effective from the afternoon of 29.11.1986. However, the accused did not hand over charge on 29.11.1986. He did not attend the office after 27.11.1986, but applied for leave. As he did not attend the office on 29.11.1986, the Regional Manager by Ext. P-22 dated 1.12.1986 permitted Natarajan Asari (PW-3), the Senior Assistant in the Punalur depot to assume charge effective from that date. Accordingly, PW-3 assumed charge of the depot and this was reported by the Regional Manager to the Managing Director of the Corporation by Ext. P-23 dated 4.12.1986. The stock of the Punalur Depot were partly stored in the Warehousing Corporation godown at Punalur and partly in the godown attached to the office, referred to by the witnesses as self-godown. Though PW- 3 assumed charge, the accused had not handed over the keys of the godown or verified the stock. Thereafter the accused reported in the depot on 13.12.1986 and in the presence of the then Assistant Manager (Accounts) (PW-2) in the Regional Office of the Corporation, brought the keys and opened the godown. He also undertook in writing by Ext.P-24 to hand over charge on the 13th, 15th and 16th December, 1986. In the presence of the accused the items found in the godown were verified. Only the stock of 21.875 quintals of M.P. boiled rice and 84 kg. Of tamarind were found in the self-godown. A stock statement was also obtained from the State Warehousing Corporation. The Managing Director of the Corporation directed a special audit to be conducted by PW-1 who was then working as an Assistant Manager in the Internal Audit Wing of the Corporation on deputation from the Accountant General's Office. Accordingly, PW-1 conducted a special audit and Ext.P-1 was prepared.

The stock in the State Warehousing Corporation godown as also the self-godown were verified as on 31.3.1986. As per Ext.P-2 stock verification report, there was an actual stock of 37.8 quintals of Palmolein and 44 quintals of free sale sugar. Subsequent to 1.4.1986, 100 quintals of paper boiled rice were transferred from the Warehousing Corporation Depot to the self-godown, and 23.65

quintals were returned from the Onam markets in Punalur. Thus, the physical stock should have been 123.65 quintals of boiled rice. But the actual stock found was 21.65 quintals. Thus, there was a shortage of 102 quintals. Similarly, a total quantity of 72 quintals of Palmolein had been transferred from the State Warehousing Corporation godown to the self-godown as per Exts. P9 and P11 goods transfer orders and Exts. P10 and P12 good transfer notes signed by the accused. But, there was no stock of palmolein. There was a stock of 46 quintals of free sale sugar as on 1.4.1986. Out of this 5 quintals had been transferred to the Maveli Store, Punalur as per a consignment note dated 31.10.1986. The stock register showed a closing balance of 30 quintals, but no stock was available in the godown. PW-1 assessed the total value of shortage of rice at Rs.33,150/- that of palmolein at Rs.1,08,000/- and sugar at Rs.22,620/-. He also reported that the accused had withdrawn loading and transporting charges for these articles as per Exts. P13 and P14 series vouchers. No irregularity was found in the transactions under Imprest, or in the accounts regarding sales and remittance. There was excess stock in the Warehousing Corporation godown as the ration dealers had not lifted and that was tallied by 31.12.1986 also. By Ext. P-1, PW-1 fixed accused's liability including infructuous expenses on transporting and cost of missing empty barrels at Rs.1,70,640/-. On 29.12.1986 the accused undertook to remit Rs.1,63,770/- being the value of the shortage of 72 quintals of palmolein, 102 quintals of rice and 39 quintals of sugar and in part payment, deposited Rs.50,000/- in the Punalur Depot on that day. By Ext. P-17 he undertook to deposit half the amount by 2.1.1987 and the balance by 31st March next year. Thereafter the matter was reported to the Board of Revenue and the accused was suspended from service by Ext.P-37 order of the Board of Revenue, dated 31.1.1987. The Managing Director of the Corporation wrote to the Director of Vigilance (Investigation) along with a copy of Ext.P-1 report. The Director of Vigilance (Investigation) sanctioned registration of a case. On the basis of the direction the then Deputy Superintendent of Police, Vigilance, Kollam (PW-10) registered a case as per Ext.P-39. He entrusted the investigation to Inspector of the Kollam Vigilance Unit-I (PW-11), who conducted the investigation and sent a report to his higher authorities. In the meantime, the accused retired from service on 28.2.1992. Since he had retired from service sanction for prosecution became unnecessary. The case was transferred to the newly established Pathanamthitta Vigilance Unit. PW-12, the Deputy Superintendent of Police, Vigilance, Pathanamthitta Unit who was put in charge of this case also verified the records and filed the charge sheet.

Before the trial Court accused pleaded innocence. Twelve witnesses were examined and 47 documents were exhibited for the prosecution to further its case. Though the accused did not examine any witness, documents were marked as Exts. D-1 to D-5. The trial Court on consideration of materials held the accused guilty and convicted him as afore-noted. The High Court in appeal confirmed the conviction, and sentence.

In support of the appeal, Mr. C.N. Sree Kumar, learned counsel submitted that in the absence of a sanction for the prosecution in terms of Section 19 of the Act and Section 197 of the Code of Criminal Procedure, 1973 (in short the 'Code') the whole proceeding was non est and the trial was vitiated. Additionally, it was submitted that the prosecution has not established any mis-appropriation and/or mens rea of the alleged crime and, therefore, both the trial Court and the High Court have acted contrary to law. It was further submitted that both the trial Court and the High Court proceeded on mere surmises and conjectures to hold that the accused had committed mis-

appropriation. The essential ingredients necessary to prove the accusations under Section 409 IPC are squarely absent. Additionally, it was submitted that both the trial Court and the High court have attached undue importance to the fact that the accused-appellant had agreed to pay the differential amount. Reliance was placed on a decision of this Court in Jiwan Dass v. State of Haryana (1999 (2) SCC 530) to contend that even if the accused had agreed to pay the amount that was not material while considering the issue whether the ingredients have been established by the prosecution. It is a case where the sanction which was sought for was refused. The prosecution has acted unfairly in taking advantage of the position that after retirement sanction is not necessary under the Act. In any event, in respect of a retired employee sanction is necessary in terms of Section 197 of the Code. Effort has been made to overreach and circumvent law after retirement and such arbitrary action should not be countenanced. Finally, it was submitted that taking note of the small amount involved and the fact that the accused has already deposited the amount the benefit available under the Probation of Offenders Act, 1958 (in short the 'Probation Act') can be extended. Strong reliance is placed on a decision of this Court in Bore Gowda v. State of Karnataka (2000 (10) SCC 260). It is pointed out that though accused has died during pendency of appeal his legal representatives have been impleaded and benefit available under Section 12 of the Probation Act should not be denied to them.

In response, Mr. Ramesh Babu learned counsel for the respondent-State submitted that the Courts below have acted in accordance with law keeping in view the correct principles and the factual scenario. Mis- appropriation is no part of an employee's official duty and, therefore, the question of any sanction under Section 197 of the Code does not arise. In any event, initially, the sanction was not accorded because the accused had retired and had agreed to pay the amount but that was not the final decision. In a case involving corruption it would be against public interest not to proceed against the accused who is guilty of mis-appopriating huge amount of stock meant for the people. The Probation Act has no application to the cases covered under the Act.

When the newly-worded Section 197 appeared in the Code with the words "when any person who is or was a public servant" (as against the truncated expression in the corresponding provision of the old Code of Criminal Procedure, 1898), a contention was raised before this Court in Kalicharan Mahapatra v. State of Orissa (1998 (6) SCC 411) that the legal position must be treated as changed even in regard to offences under the Old Act and New Act also. The said contention was, however, repelled by this Court wherein a two-Judge Bench has held thus :

> "A public servant who committed an offence mentioned in the Act, while he was a public servant, can be prosecuted with the sanction contemplated in Section 19 of the Act if he continues to be a public servant when the court takes cognizance of the offence. But if he ceases to be a public servant by that time, the court can take cognizance of the offence without any such sanction."

The correct legal position, therefore, is that an accused facing prosecution for offences under the Old Act or New Act cannot claim any immunity on the ground of want of sanction, if he ceased to be a public servant on the date when the court took cognizance of the said offences. But the position is different in cases where Section 197 of the Code has application.

Section 197(1) provides that when any person who is or was a public servant was not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government and (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.

We may mention that the Law Commission in its 41st Report in paragraph 15.123 while dealing with Section 197, as it then stood, observed "it appears to us that protection under the section is needed as much after retirement of the public servant as before retirement. The protection afforded by the section would be rendered illusory if it were open to a private person harbouring a grievance to wait until the public servant ceased to hold his official position, and then to lodge a complaint. The ultimate justification for the protection conferred by Section 197 is the public interest in seeing that official acts do not lead to needless or vexatious prosecution. It should be left to the Government to determine from that point of view the question of the expediency of prosecuting any public servant". It was in pursuance of this observation that the expression 'was' come to be employed after the expression 'is' to make the sanction applicable even in cases where a retired public servant is sought to be prosecuted.

Above position was highlighted in R. Balakrishna Pillai v. State of Kerala (AIR 1996 SC 901).

As noted in State of M.P. v. M.P. Gupta (JT 2003 (10) SC 32), sanction under Section 197 of the Code is not a condition precedent for an offence under Section 409 IPC.

It is fairly well settled position in law that actual mode of entrustment or mis-appropriation is not to be proved by the prosecution. Once entrustment is proved, it is for the accused to prove as to how the property entrusted was dealt with. In Jiwan Dass's case (supra) the factual position was entirely different. It was held that the undertaking given in that case could not be held to be confession or admission. In the present case, the factual scenario as noticed by the trial Court and the High Court is different. It was not only on the basis of the undertaking that the conviction was recorded, but the other evidence on record also unerringly proved entrustment. Therefore, it was for the accused to prove as to how the property entrusted with him was dealt with. No material was placed in that regard. Therefore, the Courts below correctly held entrustment to have been proved. The concurrent findings of fact recorded by the Courts below relating to entrustment and mis-appropriation in our view are well merited and fully justified on the basis of evidence on record and do not suffer from any perversity or patent error of law to warrant interference.

Coming to the plea relating to benefits under the Probation Act, it is to be noted that Section 18 of the said Act clearly rules out application of the Probation Act to a case covered under Section 5(2) of the Act. Therefore, there is no substance in the accused- appellant's plea relating to grant of benefit under the Probation Act. The decision in Bore Gowda's case (supra) does not even indicate that Section 18 of the Probation Act was taken note of. In view of the specific statutory bar the view, if

any, expressed without analysing the statutory provision cannot in our view be treated as a binding precedent and at the most is to be considered as having been rendered per incuriam. Looked at from any angle, the appeal is sans merit and deserves dismissal which we direct.