IN THE HIGH COURT OF JUDICATURE AT BOMBAY NAGPUR BENCH, NAGPUR

CRIMINAL APPEAL NO.699 OF 2006

Appellant : **Shri Manikrao s/o Shivram Wagh,**
Aged about – Major, Occupation – Service,
R/o Akola, Tah. & Distt. Akola.

-- *Versus* --

Respondent : **The State of Maharashtra,**
Through the Special Judge, Akola,
Tah. & Distt. Akola.

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Shri Rohit Vaidya h/f Shri Anand Parchure, Advocate for the Appellant
Shri M.J. Khan, A.P.P. for the Respondent/State.
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CORAM : S.M. MODAK, J.
RESERVED ON : 2nd FEBRUARY, 2019.
PRONOUNCED ON : 16th FEBRUARY, 2019.

ORAL JUDGMENT :-

Adjudicating rights and liabilities of litigants is the prerogative of Courts. Always, there are more than two parties before the Court. Be it civil litigation or criminal prosecution. One party asserts and another party denies and in this process of churning, what results is the final outcome. We call it as outcome of justice. In this process,a churning, Court acts as a third person. But, some time there are occasion for the Court to relinquish their job of independent

third party adjudicator and to become law settler. Such occasion arises when wrong/sins are committed in the proceedings of court and before the open eyes of the Court. And for maintaining the justice delivery system in fact, Court on its own is required to set the law into motion.

02] One of such occasion is when the witness attended the Court proceeding for giving evidence, tells one fact at one time and totally inconsistent fact at other time. With this somersault by this witness, Court resorts to its jurisdiction of punishing perjurer.

03] There was such an occasion for a Special Judge (under the Prevention of Corruption Act), Akola. He dealt with a Special Case No.4/1999 against one Samadhan Bhusari. He was tried for demanding Rs.500/- from complainant Ganesh Deshmukh. Raid was successful on 24/04/1998 in the Office of MHADA at Akola. Present appellant is one of the trap panch.

04] All went well till the time of recording of evidence. It also went well till the time Prosecutor Incharge questioned appellant/ panch-witness. But, when defence cross-examined appellant, he started saying different inconsistent stand about trap. During chief,

he said money was demanded for release of allotment of tenement in favour of complainant (as expected by the prosecution). But, during cross-examination, appellant suggested the possibility of accepting the amount was for procurement of water supply line.

05] On closing of evidence and at final stage, Special Judge, Akola acquitted Samadhan Bhusari on 20/06/2005 for the offences under Sections 7, 13(1)(d) of the Prevention of Corruption Act. Special Judge was perturbed due to somersault of appellant and had chosen to resort to the jurisdiction (and rightly so) bestowed under the provisions of Section 344 of the Cr.P.C. He directed to seek appellant's explanation for initiating action for giving false evidence.

06] The written explanation given by the appellant does not find favour with the learned Special Judge. Finally, he sentenced him to simple imprisonment for one month and inflicted fine of Rs.200/-. Appellant has to undergo 15 days simple imprisonment, if fine amount is not paid. Appellant has challenged the correctness of this judgment before me. Learned Advocate Shri Rohit Vaidya for appellant and learned Additional Public Prosecutor Shri M.J. Khan argued the matter. I have gone through the record made available. So too, I perused various judgment placed before me.

07] I have crystallized the issues. Broadly, they are procedural aspects and substantive aspects. So, the issues can be classified as (1) whether the learned Special Judge followed the procedure laid down under Section 344 of the Code of Criminal Procedure and (2) whether the act of appellant really falls under the ambit of 'giving false evidence'.

COMPLIANCE OF PROCEDURE :

08] When a person comes to the Courts and offers himself as a witness, it is expected that he will speak truth as per his understanding. In a criminal prosecution, evidence of prosecution witness plays important role because his evidence is one of the determining factor for deciding the guilt. At the same time, law does not compel a witness to depose particular fact only. Before expressing any opinion on merits, something needs to be said about procedural aspect.

09] Broadly, there are two remedies available when a person commits perjury. One is under Section 340 and another is under 344 of Cr.P.C. They are included under the Chapter XXVI “PROVISIONS AS TO OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE”. If we

read both the provisions, we may find that scope of Section 340 is much wider than the scope of Section 340 of Cr.P.C. When remedy under Section 344 of Cr.P.C. is resorted, summary inquiry is contemplated whereas wordings of Section 340 of Cr.P.C. does not say so. Court seized of the matter exercises power under Section 344 of Cr.P.C. at the time of delivery of judgment/final order. Whereas, it is not so under Section 340 of Cr.P.C. Furthermore, Court seized of the matter only punishes the perjurer under Section 344 of Cr.P.C. Whereas, Court seized of the matter conducts an inquiry, lodges a complaint and some different court tries the perjurer and punishes him under Section 193 or other sections of I.P.C. One more distinguishable factor is punishment. It is prescribed in Section 344 of Cr.P.C. itself. This is a rare section in Code of Criminal Procedure which lay down the punishment.

10] This attempt is made to make the stakeholders aware about difference in procedure in two remedies. Learned Special Judge has decided to take recourse to the power under Section 344 of Cr. P .C. On minute reading, we find the following requirements of Section 344 of Cr.P.C. -

(a) the witness had given false evidence,

(b) he gave it willfully/knowingly,

(c) he gave it with intention of using it in such proceeding,

(d) Court forms an opinion about giving of false evidence by such witness,

(e) it is necessary and expedient in the interest of justice to try the witness summarily.

On fulfilling above conditions, the Court should -

(a) give reasonable opportunity to show cause against possible conviction.

(b) then sentence him appropriately.

SUBSTANTIVE LAW :

11] Always there is tendency to confuse in between the two different procedures laid down under Section 340 and under Section 344 of Cr.P.C. There is also tendency to confuse oneself on the question of sentence. There are various offences those can be inquired under Section 340 of Cr.P.C. read with Section 195 of Cr.P.C., one of them is giving false evidence defined under Section 193 of Cr.P.C. There is punishment up to seven years and unrestricted fine amount. Whereas, Section 344 of Cr.P.C. (which is procedural as well as substantive in nature) lays down three months imprisonment or Rs.500/- fine amount or with both.

12] Before commenting on merits, we must appreciate the courage shown by learned Special Judge in proceeding under Section 344 of Cr.P.C. against this appellant. But, the issue does not stops there. There should be restraint on emotions in exercising with such power and almost precaution is to be taken in compliance of procedure and satisfaction of substantive law. Otherwise, there is a tendency of overlooking procedural requirement, during the zeal to punish perjurer.

GIVING OF FALSE EVIDENCE :

13] It is defined under Section 191 of I.P.C. and punishable under Section 193 of I.P.C. Broadly the ingredients of Section 191 of I.P.C. will have to be considered prior to satisfaction under Section 344(1) of Cr.P.C. Before going into the ratios laid down in the citations, it will be material to consider the facts of the case.

FACTS OF THE CASE :

14] It includes (a) foundation of trap case, (b) prosecution evidence in Special Case No.4/1999, (c) the observations in the judgment and (d) explanation of appellant.

[a] Foundation of Trap Case :

Complainant Ganesh Deshmukh was allotted a tenement in middle income group scheme of MHADA, Akola. He has to receive the possession. The Junior Engineer Samadhan Bhusari of MHADA was dealing with that work. In spite of repeated follow up, complainant Deshmukh did not receive the possession. Accused Bhusari demanded illegal gratification. This compelled Deshmukh to approach the office of Anti Corruption Bureau at Akola. The trap was laid on 27th April, 1998 in the office of accused Bhusari. In this trap, the present appellant acted as a panch witness.

There are two versions. Rs.500/- is accepted as illegal gratification. This is the prosecution version. Whereas, the accused Bhusari through cross-examination of panch-witness/present appellant brought on record a different reason for accepting the amount. It was for the purpose of laying of water pipe line.

[b] Prosecution Evidence :

There were three witnesses examined. It includes complainant Deshmukh [PW-1]. It includes present appellant as a trap witness [PW-2]. Ganesh Meghe, Chief Executive Officer of MHADA is examined as PW-3 (Sanctioning Authority).

[c] Observations in the Judgment :

Learned Special Judge for various reasons acquitted accused Bhusari. It includes bona fides of complainant Deshmukh. It includes genuineness of purpose for which Rs.500/- was offered. It includes non-examination of clerk Shri Lanjewar and Peon Shri Patil (who were present at the time of trap). It includes accused Bhusari was not exclusively incharge of allotment work.

The learned Special Judge on one hand acquitted accused Bhusari, on the other hand directed to call explanation of present appellant vide his order dated 20th June, 2005.

[d] Explanation of the Appellant :

He requested the learned Special Judge to give him more time as he intends to prefer an appeal against the order calling explanation. The learned Special Judge was pleased to refuse the request for two grounds. One is the period of appeal was already over and no supporting documents were filed. The reason for accepting Rs.500/- by the accused Bhusari was illegal gratification and it was in fact the mistake of the present appellant and the reason was otherwise and i.e. laying up water pipe line. The appellant realizes

this mistake when he was cross-examined on behalf of accused Bhusari's Advocate. According to him, he was not emphatic in giving the explanation for Rs.500/- towards supply of water pipe line. But, according to him, he has expressed only the possibility when cross-examined by Bhusari's Advocate. He has also expressed leniency on the ground of his insufficient education and caste.

CONCLUSION :

15] For better understanding, I would like to reproduce the facts stated by the appellant in his evidence before the learned Special Judge. It is material to state that he was first examined by the Prosecutor Incharge, then cross-examined by Bhusari's Advocate and then again cross-examined by the Prosecutor Incharge. The relevant answers are as follows :

Answer given during chief-examination

Then the complainant asked to hand over the possession of tenement by showing the allotment order. Bhusari then asked as to how Ganesh Deshmukh approached to Amravati Office, instead of Akola Office. Then he asked

as to whether the amount of Rs.500/- was brought for the possession. Ganesh Deshmukh answered it in affirmative. Then Shri Bhusari came out of room. We followed him. Then he entered the office again by another door. Then he stood aside the cupboard. We followed him. Then he demanded the amount. Then Ganesh Deshmukh took out the amount with his right hand and paid the amount to the accused.

Answer given during cross-examination by defence :

Question : *Whether it is correct to say that the complainant was asked by the accused to pay the amount to the contractor and then the complainant suggested the accused to pay the amount and then paid the said amount to the accused ?*

Answer : *The complainant paid the said amount.*

Question : *Whether it is correct to say that the complainant Ganesh Deshmukh paid the amount for the work done for the pipe line?*

Answer : *The amount paid can be for the said purpose.*

Answers given during cross-examination by the Prosecutor Incharge

Question: *In examination in chief, you have deposed that the amount was demanded for handing over of possession and today you have deposed that the amount was demanded for the work of laying down pipe line, which statement out of the two is correct?*

Answer : *My today's statement is correct.*
It is true that my earlier statement that the amount was demanded for possession is false.

16] If we read the answers as reproduced above, we may find that answers during Chief-Examination were given on the basis of what appellant had seen and heard at the time of trap. It was conducted on 27th April, 1998, and on that basis, appellant testified in Court. It will also be material to consider under which background the

appellant gave answers during cross-examination conducted on behalf of accused, Bhusari.

17] The amount paid by complainant, Deshmukh, to accused, Bhusari, may be for laying of water pipeline. The evidence of appellant needs to be read as a whole when the raiding party visited the office, accused, Bhusari, was not present. He came at 2.30 p.m. So, raiding party waited there for two-and-half-hour. For all these hours, there was interaction between complainant, Deshmukh, and present appellant. The discussion ranges from the topic of documents required, type of construction, amenities, location etc. Even appellant learnt that water and electricity supply was to be arranged.

18] So, the appellant expressed the possibility of payment on the basis of his interaction with complainant, Deshmukh. So, the two answers given by appellant were on the basis of two different sources. First is what he saw and heard at the time of trap. Second is what he interacted with complainant, Deshmukh. If we categorize the kind of evidence under which these answers fall, we will come to know that it is an oral evidence [as compared to documentary evidence]. That is to say what is heard by the appellant.

19] The true test for determining whether statement is false or not 'is whether two statements are contradictory or irreconcilable to each other.' Certainly, the amount can either be paid as an illegal gratification or it can be paid for laying of water pipeline [legitimate purpose]. It cannot be for both the purposes. This test is certainly satisfied.

20] When we tried to satisfy another test of 'willful/knowingly' disclosure, we find that the case fails on this forum. It means, the witness must tell the contrary fact knowingly or willfully. According to evidence, it is a second statement which is false. As discussed above, there is a reason for the appellant to give explanation for payment of Rs.500/- and it being for laying of water pipeline. He gave it as per interaction between him and complainant, Deshmukh. So, we can certainly say that there is some foundation for that. Under such circumstances, it cannot be said that second statement was willful/with knowledge. Learned Special Judge has not considered this aspect.

21] In this background, if we will consider the reasoning for acquitting the accused, Bhusari, we will come to know that learned Special Judge opined that the amount might have been accepted for

obtaining water supply. When prosecution adduces evidence, the materials must fall within the definition of “legally accepted evidence”. Unless and until legally admissible evidence is produced, prosecution materials cannot be considered. In other words, merely because any accused is acquitted, it does not mean that he has not committed that offence. As said above, failure of the prosecution to examine Lanjewar and Patil is one of the ground for acquittal. It also includes lack of bona fide on the part of complainant, Deshmukh. He was already having a tenement and he feared about cancellation of allotment. On considering the reasons quoted by learned Special Judge while acquitting the accused, Bhusari, learned Special Judge, apart from considering above reasons, also considered probable reason for payment as for laying water pipeline. Learned Special Judge could have discarded the explanation given by this appellant about payment. But, when he has accepted it, then it may not wise to initiate action against him. If it is so, then I do not think that it will be proper to call explanation of present appellant. Admittedly, nothing is produced on record to show that the acquittal of accused, Bhusari, is challenged on behalf of the prosecution. So, on this aspect also, the learned trial Judge has erred.

22] In case of **Empror Vs. Bankatram Lacchiram** reported in ILR 1904 28 (Bom) 513, the two depositions given after a gap of time were the foundation for initiating action for the perjury. The ratio of this judgment is that the circumstances under which a witness gives answer at a particular point of time and at a later point of time needs to be considered. A witness always deposes by recollecting his memory and belief. It will also be material to consider the evidence as a whole and not the objectionable answers isolately.

23] In case of **Empror Vs. Ningappa Ramappa Kurbar** reported in ILR 1942 (Bom) 26, the witness deposed a particular fact in a statement under Section 164 of Criminal Procedure Code, 1898 and deposed a contrary fact before committing Magistrate was the foundation. Only when Court finds later statement to be untrue, then only prosecution can be justified.

24] Similar occasion arose in case of **K. K. Gupta Vs. Devkumar Agrawal** [2014 ALL MR (Cri.) 3869]. The appellant made a particular statement when his statement was recorded by Income Tax Officer at the time of search. Whereas at a later point of time while submitting Income Tax Return, he claimed ownership over certain articles. There was a private complaint for perjury. The

appellant was acquitted for the reason that mere contradiction in two statements is not sufficient, but prosecution need to prove falsehood.

25] On the other hand, learned Addl. Public Prosecutor relied upon the judgment in case of **In Re : Suo Motu Proceedings against R. Karuppan, Advocate** [(2001) 5 SCC 289]. One Advocate from Madras made a false complaint about verification of the age of Dr. Justice A.S. Anand in an affidavit. Hon'ble Supreme Court emphasized on decline in moral values and erosion of sanctity of oath. There was a direction to file complaint under Section 193 of Indian Penal Code.

26] There cannot be any doubt that Court being the guarantor and protector of justice delivery system has to be cautious while encouraging truthful evidence. And, whenever the sanctity of oath is being misused for telling lie, the Court has to intervene and to set the law in motion. In case before us, I find that the learned Special Judge was courageous enough to initiate action for perjury, but, he lost sight to the fulfillments of ingredients of giving false evidence.

27] There is one more issue wherein the learned Special Judge has failed. Satisfaction is required at two stages. One is at the time of

calling of explanation and second is at the time of final order. The decision to call explanation can be seen from the direction given in the operative order dated 20th June, 2005. But, if the entire judgment of acquittal is perused, we do not find any observation why there is a need to proceed against the appellant and that too in the interest of justice. While showing the zeal to proceed for perjury, learned Special Judge has overlooked to this procedure requirement. So also, while convicting the appellant, I do not find any reasoning as to how he arrived at giving false answer knowingly. Merely saying that he gave false answers knowingly is not sufficient unless supported by reasoning. On this count also, the impugned judgment cannot be sustained.

28] For all these reasons, I conclude that the decision cannot be sustained, mainly for the reason of non-fulfillment about the condition as to willful or knowingly giving false answer. It also fails for recording satisfaction for initiating action and supporting the conclusion by giving reasons. So, I am inclined to allow the appeal. Hence order -.

(i) The appeal is allowed.

(ii) The judgment dated 4th December, 2006 passed in Misc.

Criminal Application No.440 of 2005 convicting the appellant under Section 193 of Indian Penal Code is set aside.

(iii) Fine if paid, be returned to the appellant. [iv] The appellant is discharged from personal bond and surety bond.

(S.M. Modak, J.)

***sandesh**