

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL. APPEAL NO.90/2002**

% **RESERVED ON: JULY 08, 2011**
DATE OF DECISION: August 04, 2011

P.K. GUPTA

....APPELLANT

THROUGH: Mr. Sidharth Luthra, Sr. Advocate with Mr. Pramod Kumar Dubey, Mr. Nitesh Mehra, Mr. Ankur Garg, Mr. Yashpreet Singh & Mr. Ashish Dixit, Advocates

VERSUS

C.B.I

....RESPONDENT

THROUGH: Mr. Narender Mann, Special Public Prosecutor for CBI.

CORAM:
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether reporters of Local papers be -Yes
allowed to see the judgment?
2. To be referred to reporter or not? -Yes
3. Whether the judgment should be reported
in the Digest? -Yes

M.L. MEHTA, J.

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1. The appellant, a Junior Engineer, working with MCD at the relevant time, was convicted by learned Special Judge Shri R.K. Gauba under Section 120B, 161 of IPC and under Section 5(1) (d) read with Section 5(2) of Prevention of Corruption Act, 1947 (for short, "the Act"). He has been sentenced to undergo RI for three years with fine of ₹5,00/- under Section 161 IPC and RI for four years with fine of ₹500/- under Section 5(2) of the Act. The

substantive sentences were to run concurrently. In default of payment of fine, he was to undergo additional RI for a period of three months on each count. The appeal is directed against the impugned order of conviction and sentence respectively dated 30th January 2002 and 31st January 2002. The co-accused Phool Singh (PS), who was working as *Beldar* in the MCD at the relevant time has since expired and the proceedings qua him stood abated in the trial court.

2. The prosecution case as set out in the charge-sheet is that on 26th November 1986, a complaint dated 26th November 1988 was made by complainant Amarnath Babbar (PW2). It was alleged therein that at about 4 pm on 22nd November 1986, when he was carrying out repairs in his shop at Kishan Ganj Market, the appellant came along with *Beldar* Phool Singh (PS) and demanded ₹1,000/- to permit him to carry repairs and he also directed the money to be handed over to co-accused PS. On 25th November 1986, the appellant again along with PS came to his shop in the evening and asked for the money. Though, at the request made by the complainant, the appellant agreed to accept ₹700/- to be paid by next evening to PS, however, complainant could arrange only ₹500/- at the time of making the complaint. On the basis of this complaint, an FIR No. RC 73/86 (Ex.PW7/A) was registered. Inspector R.S. Jaggi (PW7), who was entrusted the same, decided to lay a trap. Two independent witnesses R. Murli (PW4) and BS Dahiya (PW6), both employees of L&DO, Nirman Bhawan were associated. In addition, the trap party included Inspectors P. Lal and R.N. Azad and SI Syed Wazaullah of CBI. PW4 R. Murali was to act as a shadow witness. A micro

tape recorder was given to PW2 to record the conversation between him and the accused persons. The complainant (PW2), as directed, had arranged five notes of ₹100/- each. The number of these currency notes were noted down in the handing over memo (Ex.PW2/B). The currency notes were given phenolphthalein powder treatment. The usual demonstration as to how the powder will react with sodium carbonate solution was given by Inspector Azad. The trap party reached at the shop of complainant (PW2) and at about 4.45 pm, co-accused PS came to the shop and asked the complainant for the money ₹500/- which was passed onto him by the complainant (PW2) who also told him that the remaining ₹200/- shall be given after one or two days. Thereafter, the complainant gave pre-determined signal, whereupon members of the trap party reached there and PW7 caught hold of PS, who immediately dropped the currency notes. The procedure regarding taking of hand wash of co-accused PS and the rest of the post-trap proceedings like taking hand wash, seizure of the tainted money, preparation of recovery memo etc. formed part of the post-trap recovery memo (Ex.PW2/D). The hand wash of both the hands of co-accused PS turned pink. From the personal search of PS, another sum of ₹500/- was also recovered. Micro-cassette tape recorder was also recovered from PW2. Since the money was allegedly to be passed on to the appellant, another handing over memo (Ex.PW4/D) was prepared for ₹1000/-, with ₹500/- given to PS by the complainant (PW2) and ₹500/- collected by co-accused PS from another person. Thereafter, the trap party left for the office of the appellant and reached there at about 6 pm. Co-accused PS went to the office of appellant

followed by Inspector P. Lal. The shadow witnesses PW4 R. Murli waited near the door of the office. It is alleged that the appellant accepted ₹1000/- from PS with his right hand and put the same in his shirt pocket. Thereafter PW4 R. Murli gave a pre-arranged signal and the appellant was caught hold by PW7 Inspector Jaggi and Inspector P. Lal. On the directions of Inspector Jaggi, Inspector Azad recovered bribe money from left pocket of appellant and the same was handed over to PW6 B.S. Dahiya for tallying the numbers with currency notes already noted. Hand washes were taken which gave positive result. The rest of the formalities relating to preparation of recovery memo, personal search memo, site plan, etc. were conducted and thereafter both, the appellant and co-accused PS were arrested. However, co-accused PS was released there on bail. After obtaining sanction for prosecution of the appellant as also of PS, they were sent to face prosecution.

3. Both the accused persons (i.e. the appellant and the co-accused PS) were charged under Section 120B, 161 IPC and under Section 5((1) (d) punishable under Section 5 (2) of the Act, to which they pleaded not guilty.

4. The prosecution to prove its case examined 7 witnesses. However, Inspectors P. Lal, R.N. Azad and SI Syed were not examined.

5. Thereafter the statements of both accused persons (appellant and co-accused PS) were recorded separately under Section 313 Cr.P.C. The appellant admitted to be working as JE in the MCD at the relevant date. He expressed his ignorance about evidence concerning complaint by PW2 to CBI and the pre-trap proceedings as also the recovery of ₹500/- from PS. He

admitted that co-accused PS had come to his room. He stated that he was going to the office of Zonal Engineer to deliver certain documents when he was caught hold of by CBI officials in the gallery and that his shirt was removed near CBI office, CGO Complex. He denied the validity of the sanction, terming the same to be illegal and accorded without application of mind. He also stated that co-accused PS was not working directly under his control, but had been deputed with other *Beldar* on demolition vehicle under the supervision of Zonal Engineer. He led no evidence in defence. Co-accused PS in his statement under Section 313 Cr.P.C also admitted that he was posted as *Beldar* with MCD at the relevant time. He admitted the evidence about his visit to the shop of complainant on 22nd November in the company of appellant, but added that he had been asked by the appellant to stand near the scooter. He denied evidence about demand of bribe or haggling over the amount of money. He showed ignorance about the complaint of PW2 to CBI and the preparations for laying trap. He also admitted visit to the shop of complainant on 26th November at about 4.45 pm, but stated that he had been sent there by the appellant. He also admitted evidence about he having received the currency notes (Ex. P1 to P5) worth ₹500/- from PW2 and also he having thrown the same on the ground. He admitted evidence about he having confirmed, to come to collect the money at the instance of Mr. Gupta, who was waiting in the office. He claimed that he had informed the CBI officials at that very stage that he had come to collect the money on the instructions of the appellant. He admitted that five other currency notes of ₹100/- were recovered from his personal search. He further admitted giving of

₹1,000/- by CBI to him with instructions to pass on the same to the appellant in the event of specific demand and having gone with other members of the trap party to the office of appellant at about 6 pm. He stated the manner as to how he passed on the said money to appellant, who accepted the same and kept in his pocket, followed by CBI officials, catching hold of appellant. He did not admit the evidence about conversation between him and the appellant at that stage and showed ignorance about remaining evidence. He claimed that he had been falsely implicated by the complainant who was mixed up with the appellant. He referred to his earlier visits to the shop of complainant PW2 in the company of appellant on 22-11-1986 and 25-11-1986 when appellant had taken him along on his scooter, but claimed that he had been asked by the appellant to stand on a road side, while the appellant had gone on the pretext of talking with someone. He stated that he did not know with whom the appellant met or talked. He stated that on 25th November, 1986 on return from Kishan Ganj when he was standing near the scooter, the appellant had told him that he would be sending him to the shop of complainant (PW2) to collect money. He stated that he after having collected ₹500/- from a scooter repair shop in Pratap Nagar, had gone to the shop of complainant (PW2) and collected the money. He stated that he did not know as to what was the purpose of collecting money and he denied that he had any conversation with the complainant (PW2) and pleaded ignorance if conversation had been recorded in any cassette. He also questioned the correctness of conversation, stating that no such talks ever took place between him and the complainant (PW2) and the tape had been tampered

with. He stated that the cassette (Ex.P11) did not contain his voice. He declined to lead any evidence in defence.

6. I have heard learned Senior Counsel Shri Siddharth Luthra for the appellant as well as Mr. Narender Mann learned Senior Public Prosecutor for CBI and perused the record.

7. Learned Senior Counsel Mr. Luthra at the outset submits that there was no demand of bribe ever made by the appellant and so there was no question of acceptance thereof by him. He submits that the recovery of tainted money from the appellant was planted and in any case, that alone in the facts and circumstances, was not enough to prove the guilt of the appellant. In this regard, he also submits that the giving of ₹1,000/- by co-accused PS to the appellant would not amount to demand or acceptance of bribe money by the appellant.

8. He further submits that even otherwise the prosecution has failed to prove any motive or the reason for demand, nor there was any reason or occasion for the complainant to pay the bribe to the appellant. However, the learned Prosecutor submits that the appellant had made demand of bribe money from the complainant through his co-accused PS. This fact was so specifically stated and maintained by the complainant, PW-2 and so admitted by co-accused PS in his statement under Section 313 Cr.P.C. He submits that the recovery of tainted money from the appellant immediately after the same was accepted by co-accused PS from the complainant, would raise a presumption of guilt of the accused/appellant.

9. I have given my considered thought to the submissions made by learned counsel for the parties and perused the record.

10. Before proceeding to advert to the submissions of the learned counsel for the parties, it may be useful to see the ingredients of Section 161 IPC and also Section 5(1) (d) of the Act. Section 161 IPC has since repealed by Section 7 of the Act. The essential ingredients of Section 7 are:

- (i) that the person accepting the gratification should be a public servant;
- (ii) that he should accept the gratification for himself and the gratification should be as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official function, favour or disfavour to any person.

Section 5(1)(d) of the Act of 1947 being *pari materia* to Section 13(1) (d) of the Act of 1988, the essential ingredients of Section 13(1) (d) of the Act are:

- (i) that he should have been a public servant;
- (ii) that he should have used corrupt or illegal means or otherwise abused his position as such public servant; and
- (iii) that he should have obtained a valuable thing or pecuniary advantage for himself or for any other person.

11. There is no dispute that the appellant was a public servant at the relevant time. The question for determination would be as to whether he had accepted the gratification for doing favour to complainant in exercise of his official function or that he has used illegal means or otherwise abused his position as such public servant and obtained valuable thing or pecuniary advantage.

12. In the case of *C.K. Damodaran Nair v Govt. of India* 1997 Crl.L.J. 739, the Supreme Court considered the word “obtain” used in Section 5(1)(d) and held as under:

“12. The position will, however, be different so far as an offence under Section 5(1)(d) read with Section 5(2) of the Act is concerned. For such an offence, prosecution has to prove that the accused “obtained the valuable thing or pecuniary advantage by corrupt or illegal means or by otherwise abusing his position as a public servant and that too without the aid of the statutory presumption under Section 4(1) of the Act as it is available only in respect of offences under Section 5(1)(a) and (b)—and not under Section 5(1)(c), (d) or (e) of the Act, “Obtain” means to secure or gain (something) as the result of request or effort (Shorter Oxford Dictionary). In case of obtainment the initiative vests in the person who receives and in that context a demand or request from him will be a primary requisite for an offence under Section 5(1)(d) of the Act unlike an offence under Section 161 IPC, which as noticed above

can be, established by proof of either “acceptance” or “obtainment”.

13. In the case of *M.W. Mohiuddin v State of Maharashtra* 1995 (2) SCR 864, the Supreme Court referring to the case of *Ram Krishan and another v State of Delhi* (1956) SCR 183 as well as dictionary meaning of the word “obtain” observed as under:

“...whether there was an acceptance of what is given as a bribe and whether there was an effort on the part of the receiver to obtain the pecuniary advantage by way of acceptance of the bribe depends on the facts and circumstances of each case. In that case, the Court held that it was proved that accused made a demand and also got the affirmation from the complainant that he had brought the demanded money and at his instance, the complainant wrapped the money in the handkerchief given by the accused and placed the same in the bag which was brought by the accused and as asked by him, these steps have been taken into consideration in arriving at the conclusion that the accused had in fact “obtained” the pecuniary advantage, namely, that he received the illegal gratification. Therefore, the Court upheld the conviction under Section 13(1)(d).

14. In **A. Subair v State of Kerala**, (2009) 6 SCC 587, the Supreme Court held as under:

“The legal position is no more res integra that primary requisite of an offence under Section 13(1)(d) of the Act is

proof of a demand or request of a valuable thing or pecuniary advantage from the public servant. In other words, in the absence of proof of demand or request from the public servant for a valuable thing or pecuniary advantage, the offence under Section 13(1)(d) cannot be held to be established.”

15. It is settled law that mere recovery of bribe money, divorced from the circumstances under which it is paid, is not sufficient to convict the accused when the substantial evidence of demand and acceptance in the case is not reliable. (See **M. Narsinga Rao v. State of AP** 2001(1) SCC 691. In view of above propositions of law, it is recapitulated that the statutory presumption under Section 20 of the Act is available for the offence punishable under Section 7 or Section 11 and not for Clause (d) of Section 13(1). For offence under Section 13(1)(d), it will be required to be proved that some initiative was taken by a person who receives and in that context demand or request from him will be a pre-requisite.

16. In view of above proposition of law, it may be reiterated that for an offence under Section 161 IPC and Section 5(1)(d) of the Act of 1947, it will be required to be proved that some initiative was taken by the receiver namely the appellant. A demand or request emanating from the appellant and his accepting the tainted money would be a prerequisite for establishing the guilt under Section 161 IPC and Section 5(1) (d) of the Act or Section 7 and 13(1) (d) of the Act of 1988.

16. According to complainant PW2, it was PS who came to demand the money on 22nd November 1986 and 25th November, 1986. He in clear terms not stated that either appellant himself demanded or was present at the time of demand by PS. As per the complaint, appellant had come to his shop with PS on 22nd November 1986 demanding ₹1000/- and had also come on 25th November 1986 on which date the complainant, PW-2 stated that he was unable to pay ₹1000/- and the appellant allegedly reduced the amount to ₹700/-. During his statement in the Court, PW2, however, failed to identify the appellant as the person who had allegedly come to his shop on 22nd November 1986 and 25th November 1986. He stated that the demand of ₹1000/- on 22nd November 1986 was made by PS and not by the appellant. He also stated that on 25th November 1986, it was PS who had come and demanded ₹1,000/- and the other person accompanying him was sitting on the scooter at a distance from his shop. When he stated to PS that the amount was excessive, he, on the asking of PS, went to talk to that person sitting on the scooter with his helmet on his head. PW2 stated that he could not say whether that person who was sitting on the scooter with the helmet was the appellant. He failed to identify the appellant even after he was made to wear helmet in the court.

17. Further PW2 in his cross-examination by the counsel for PS, in reply to a question regarding inconsistencies between his complaint dated 26th November 1986 and the statement made in the court, stated that he had informed the CBI all the actual facts, but he had been asked to write the complaint in the manner dictated by CBI. He maintained that it was on the

dictate of CBI that it was mentioned by him in the complaint that J.E. Mr. P.K. Gupta (the appellant) demanded money from him. He maintained that complaint Ex.PW2/A had been dictated to him by CBI Inspector Jaggi (PW7) on 26th November 1986.

18. PW2 also in his cross examination stated that he came to know of the appellant from persons sitting in his shop on 25th November 1986 and his neighbour, Mr. Batra who told him the name of J.E. of the area as P.K. Gupta. This fact would show that the complainant was not aware as to who Mr. P.K. Gupta was, but it was on the saying of persons present in his shop and also one neighbour Mr. Batra that P.K. Gupta was the J.E. of the area and thereupon he wrote his name in the complaint given to CBI. The fact that he did not know the other person as P.K. Gupta and also that he could not identify him would also be borne from his statement when he stated that he could not recognize him and that he had come to know in the court only that the other accused who was sitting on the scooter was P.K. Gupta. He stated that it was accused PS who had come to him and objected to his carrying out the repairs. In a question by learned Senior Public Prosecutor, PW2 stated that since P.K. Gupta is present in the Court so he could identify him, but as per the incident, he could not say if he was the one who had accompanied co-accused PS. He maintained in cross examination that he had mentioned the name of P.K. Gupta because he had been told by the people of the area that J.E. of MCD of that area was P.K. Gupta. Again in an answer to a question he could not say whether the man who accompanied co-accused PS on 22nd November 1986 and 25th November 1986 was the one who was present in the

Court namely P.K. Gupta, the appellant. He specifically denied the suggestion that it was the appellant who had come with PS on 22nd November 1986 and 25th November 1986. He admitted that it was accused PS who had come to his shop on 25th November 1986 at about 4.45 pm and he had enquired from him as to who he was. On this PS told him that he was sent by J.E. P.K Gupta. In his cross examination by the learned Prosecutor, in an answer to a suggestion that he had admitted that he had mentioned in the complaint Ex.PW2/A that on 22nd November 1986 when he was getting his shop repaired, J.E. P.K. Gupta along with PS had arrived there and told him that he could not carry the repairs and that this fact was recorded by him in his complaint. This admission would have no relevance in view of the fact that he had stated that he did not know the name of J.E. as P.K. Gupta, which he had learnt from the customers and also his neighbour and further that the name of P.K. Gupta was made in the complaint on the dictation by CBI official and also that he came to know his name during the court proceedings.

19. With regard to the incident of 26th November 1986, PW2 categorically stated that it was PS who had demanded the money and he gave ₹500/- to him which he accepted in his right hand and kept the same in his left hand. He also told him that the balance of ₹200/- would be given in a day or two. He also admitted that it was accused PS who gave him the assurance that he would not be in a problem in carrying repairs/ construction work. In the cross examination on behalf of accused PS, it was suggested to him that on 22nd November 1986, he did not have any talk whatsoever with other person who continued to remain sitting throughout on the parked scooter, PW2 admitted

the same to be correct. In an answer to another question that the said person who was sitting on the scooter asked him *"Paiso Ka Intjam Ho Gaya Hain PS Ka De Dena"*, to which PW2 stated that this was not stated in the complaint Ex.PW2/A, though it was found recorded therein. He explained that he had himself not stated so even on 26th November 1986, but it was dictated to him. PW2 stated that there are certain changes in complaint Ex.PW2/A regarding the facts narrated by him to CBI, which he categorically stated was as per dictation by CBI official. He stated that CBI officials told him that the complaint has to be written in this manner that P.K. Gupta had demanded money from him.

20. In his cross examination on behalf of co-accused PS, it was suggested to him that the person with whom he had talked on 25th November 1986, was the appellant, now present in the Court and that he had no talks whatsoever with accused PS on those dates. He denied these suggestions to be correct. He also denied that he knew the appellant from even prior to 22nd November 1986 as the J.E. of the area. It is noted that the plea sought to be taken by the co-accused PS in this regard was inconsistent inasmuch as on the one hand his case was that he had been sent by the appellant and it was at the instance of the appellant that he had demanded and accepted the money from the complainant, PW2. On the other hand it was sought to be put to PW2 that PS had no talks with appellant on these dates. It was also admitted by PW2 in his version that there was no reference to the name of the appellant as P.K. Gupta, but there was only reference to one "Guptaji". It was stated and maintained by PW2 that accused PS was told by CBI that when he

will give money to the appellant, he would be released. From the lengthy testimony of PW2 which continued for several dates, nothing could be elicited by learned Prosecutor or learned counsel for the accused PS that any demand of bribe was made by the appellant. Throughout he maintained the demand of bribe money having emanated from co-accused PS, though the latter had been claiming the same to be at the instance of "Guptaji". It was at the fag end of his having undergone lengthy cross examination that PW2 in his re-examination by learned Prosecutor stated that by "Guptaji" he meant "P.K. Gupta", but that was of no consequence in the light of his entire testimony as discussed above.

21. The fact that PW2 stated and maintained that CBI official told co-accused PS to give the money to the appellant and in that event he would be released, and in fact was released, would have prompted co-accused PS to hand over the bribe money to the appellant to save himself. It was also the case of the prosecution and so deposed by PW2, PW4, PW6 and PW7 that the money was to be paid by co-accused PS to the appellant on a specific demand. It is gathered from the evidence of these witnesses that PW4 R. Murali who was to act as a shadow witness in the transaction of giving of money by the co-accused PS to the appellant, did not go inside the room, but remained standing outside the door of the room. It was the co-accused PS alone who had gone inside the room and gave money to the appellant. Admittedly at the time of giving of money by the co-accused PS to the appellant, no conversation took place between them. As per PW4 R. Murali, the money given by co-accused PS was taken by the appellant and kept in his

pocket. There was nothing on record to suggest that there was any demand by appellant. There is no evidence relating to demand emanating from the appellant at this stage as well. There was no conversation between the two at this stage. It is entirely improbable that accused PS while giving money to appellant would not speak with him and tell him that he has made collections instructed or that appellant would not inquire from him about the details of the manner of collections. Accused PS knew that PW-4 is present near the door. He would have spoken with the appellant to impress upon PW-4 that he actually collected money at the instance of the appellant. He was instructed by the CBI to pass on the money to appellant on specific demand, but he without speaking with the appellant or any act demonstrating that he had actually collected the money on his behalf gave money to him. It all casts serious doubt on his version that he demanded and accepted the money on behalf of the appellant. In these circumstances the taking of money by the appellant cannot be acceptance of bribe money in pursuance of any demand by appellant. Accused PS in answer to a question in his statement under Section 313 Cr.P.C also indicated that no such demand at that time was made by the appellant. In the background of the fact that there was no reliable evidence regarding initial demand made by the appellant from the complainant, PW2, and there being no evidence of any demand being made by the appellant from accused PS, the mere giving of money by PS to the appellant cannot be taken as acceptance of bribe by the appellant from co-accused PS. Neither from his action in accepting the money from accused PS nor from his conduct, it could be said with certainty that the appellant had

accepted the money to be as bribe money. In the circumstances, it could not be ruled out that accused PS had demanded and accepted the money from the complainant in the name of the appellant. The entire evidence as led by the prosecution in this regard was shaky and thus unreliable.

22. In view of such evidence, the recovery of tainted money from the appellant alone could not be said to be sufficient to hold him guilty of the offences under Section 161 IPC and Section 5(1)(d) of the Act. On this ground alone, the appellant was entitled to acquittal on account of benefit of doubt.

23. In addition to above, In my view there are inherent and unexplained discrepancies and contradictions which appeared in the versions set up by different witnesses examined by the prosecution;

(i) the complainant PW2 stated that from CBI Office they went to Nirman Bhawan from where PW4 R. Murali and PW6 Dahiya were picked up on the way to his shop. He stated that the pre-raid proceedings were completed before leaving for Nirman Bhawan. If that was so, these proceedings were completed in the CBI office in the absence of PW4 and PW6;

(ii) PW4 R. Murali stated that he had gone to the office of CBI one day prior to the present raid i.e. 26th November 1986. He stated that on 25th November 1986 in respect to the same complaint a raid was organized by the same Inspector, but it could not materialize because the appellant Mr. P.K. Gupta was not present in his office. He stated that before proceeding on 25th November 1986, he was shown the written complaint of PW2 Amarnath, but he could not say if it was dated 25th November 1986 or any other date. He

stated that on 25th November 1986, complainant, PW2 did not accompany the raiding party to the office of P.K. Gupta and he did not know where he was at that time. He further stated that the demonstration was given to them at CBI office on 25th November 1986 and handing over memo was also prepared on 25th November 1986 and that these proceedings were not repeated on 26th November 1986. He maintained that on 25th November 1986 there were 5-6 persons forming part of the raiding party, who went to the office of the appellant P.K. Gupta. In his cross examination also he maintained about the raiding party visiting the office of the appellant on 25th November 1986 for raid and that demonstration was given to them in CBI office on 25th November 1986 i.e. one day prior to the arrest of the accused persons. He did not remember as to when he saw the complainant, PW2 for the first time on 26th November 1986 and where it was. He did not remember from where he had gone to the shop of complainant, PW-2 on 26th November 1986. In answer to a specific question, he stated that he could not admit or deny that he went to the CBI office in connection with this case on 26th November 1986 and not on 25th November 1986. He categorically denied that he did not visit the CBI office one day prior to the arrest of the accused persons or that no proceedings pertaining to investigation of this case took place one day prior to the date of arrest of the accused persons. He maintained that he was sure that he visited CBI office one day prior to the arrest of the accused persons. This part of the testimony of PW4 remained unexplained by the prosecution and creates a serious doubt in the case. This could not be overlooked in view of the fact that PW2 had stated that the complaint was dictated by the CBI

officer and that it was at his instance that the name of the appellant was mentioned therein as P.K. Gupta and further that co-accused PS was not only assured to be released, but actually released forthwith after arrest of the appellant. This all would lend credence to the defence of the appellant that the trap against the appellant was motivated at the instance of CBI;

(iii) PW4 stated that the statement of co-accused PS was recorded at the shop of the complainant Amarnath before he was taken to the office of the appellant, whereas PW6 stated that no such statement was recorded. If statement of co-accused PS was so recorded, as stated, the non-production of the same has not been explained;

(iv) Inconsistent to others, PW4 stated that it was one note of ₹500/- recovered from the personal search of co-accused PS. The story set up by the prosecution that ₹500/- recovered from the personal search of co-accused PS had been received by him from some other shopkeeper at the behest of the appellant, is unbelievable due to lack of evidence in this regard. No effort seems to have been made by the Investigating Officer in making further investigation in this regard. Instead IO straight away proceeded to presume the same to be correct.

(v) It was the case of the prosecution that the practical demonstration of phenolphthalein powder and sodium carbonate was given by Inspector R.N. Azad and that the recovery of ₹1000/- was also effected from the pant pocket of the appellant by Inspector Azad. The prosecution has not chosen to examine this material witness for unexplained reasons. However, PW6 had

stated that the recovery was effected from the appellant by him and Inspector P. Lal and it was also found recorded in his statement made to the police (Ex.PW6/A) that it was he who searched the shirt pocket of P.K. Gupta and recovered ₹1000/-. Likewise, Inspector P. Lal has also not been examined by the prosecution for unexplained reasons;

(vi) When PW2 admitted that he did not know as to who the other person sitting on the scooter was and was informed by his customers and neighbour Mr. Batra, not only that none of them was examined, but no effort was made to carry investigation in this regard.

24. In view of my foregoing discussion, I am of the considered view that the prosecution has not been able to prove its case against the appellant beyond reasonable doubt. As such the appellant/accused deserves acquittal and accordingly acquitted of the offence for which he was charged.

25. The appeal stands disposed of.

(M.L.MEHTA)
JUDGE

AUGUST 04, 2011
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