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C.A.No.755 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.11.2022

PRONOUNCED ON : 24.05.2023

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.A.No.755 of 2016

T.Vijayakumar,
S/o.Thangaraj,
Formerly Asst. Commissioner/Executive Officer,
Arulmighu Sugavaneshwarar Temple,
Salem City,
Salem.

... Appellant

Vs.

The State,
Rep. by Deputy Superintendent of Police,
Vigilance and Anti-Corruption,
Salem.
(Crime No.13/AC/2009).

... Respondent

PRAYER: Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, to set aside the judgment of Conviction and Sentence imposed by the learned Special Judge (Special Court for Trial of Cases under Prevention of Corruption Act), Salem, dated 14.10.2016 in Special C.C.No.57 of 2014 and allow the Criminal Appeal.

For Appellant : Mr.M.Mohamed Riyaz for
Mr.R.Sasikumar

For Respondent : Mr.S.Udayakumar,
Government Advocate (Crl. Side)



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JUDGMENT

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This appeal arises out of the conviction and sentence imposed by the learned Special Judge, Special Court for Trial of cases under the Prevention of Corruption Act, Salem in Special C.C.No.57 of 2014, dated 14.10.2016, wherein the appellant was tried for the offence punishable under Sections 7 and 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988 (Hereinafter referred to as 'Act'). After ful-fledged trial, the learned Special Judge convicted the appellant for offence under Section 7 of the Act and sentenced him to undergo one year Rigorous Imprisonment and to pay a fine of Rs.10,000/- in default, to undergo 6 months Simple Imprisonment. Similarly, the appellant was convicted for offence under Section 13(2) r/w 13(1)(d) of the Act and sentenced to undergo two years Rigorous Imprisonment and to pay a fine of Rs.15,000/- in default, to undergo one year Simple Imprisonment. The sentences were ordered to run concurrently.

2.The background facts of the case, as projected by the prosecution, are as follows:-



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2.1.The defacto complainant Saravana Gurukkal (since deceased), PW5-Raja, PW6-Viswanathan, PW7-Nagarajan and PW8-Sundar were serving as Archakars/Gurukkals in Sri Raja Ganapathy Temple situated at Salem. The appellant/accused took over charge of the post of Assistant Commissioner/Executive Officer of Sri Sugavaneshwarar Temple, Salem on 09.04.2009. Sri Raja Ganapathy Temple and Sri Kasi Vishwanatha Temple situated in Salem, which comes under the control and administration of the appellant. As soon as the appellant assumed charge as Executive Officer of Sri Sugavaneshwarar Temple, Salem, he summoned all Gurukkals of Sri Raja Ganapathy Temple to his office. Accordingly, PW5-Raja and PW6-Viswanathan went to the office of the appellant situated at Sri Sugavaneshwarar Temple and met the appellant. At that time, the appellant informed PW5 and PW6 that all Gurukkals employed at Sri Raja Ganapathy Temple should pay monthly mamool in respect of the offerings received by them from the worshipers in Kaanikkai Thottu at the time of performing poojas. PW5 and PW6 refused by saying that such a practice is not at vogue in Sri Raja Ganapathy Temple and informed the same to the defacto complainant Saravana Gurukkal.



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2.2.On the very same day, in the evening, the defacto complainant Saravana Gurukkal along with PW8-Sundar met the appellant in his office. At that time also, the appellant reiterated the demand with them. The defacto complainant and PW8 refused the demand of the appellant by expressing that they themselves are in dire straits. Thereafter, on 30.06.2009, the appellant visited Sri Raja Ganapathy Temple to open the hundial. At that time, PW5 was in-charge of performing pooja in the temple. PW9, the uncle's son of PW5 came to the temple to offer worship. On seeing PW9 standing in the sanctum sanitorium, the appellant shouted at PW5 as to how PW9 can be allowed to perform pooja in the temple and issued memo, dated 02.09.2009 (Ex.P10) to PW5 seeking explanation. Thereafter, a reply (Ex.P11) was given by PW5 to the appellant.

2.3.Subsequently, on 22.08.2009, at about 5.30 p.m., on the prior permission of PW14-Jothi Palanisamy, the then Managing Trustee of Sri Raja Ganapathy Temple, PW10-Kannan and one Thirugnanasambantham went to Sri Raja Ganapathy Temple and tried to perform pooja in the presence of PW14 and other trustees. At that time, all Gurukkals



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objected and indulged in stay-in-protest. On instructions of PW14, PW10 and Thirugnanasambantham left the temple. Thereafter, on 08.09.2009, the defacto complainant informed PW5 to PW8 that the appellant contacted him through cell phone with instructions to meet him and to pay monthly mamool as otherwise he will take disciplinary action for the stay-in-protest done on 22.08.2009 and also appoint outsiders as Gurukkals to the temple. On 09.09.2009, at about 06.30 p.m., when the defacto complainant and PW6 met the appellant at his residence, he demanded bribe of Rs.10,000/- for not taking disciplinary action against all Gurukkals and demanded to pay bribe amount before 03.00 p.m., on 10.09.2009. PW6 and the defacto complainant disclosed the demand made by the appellant to PW5, PW7 & PW8. Since the defacto complainant, PW5 to PW8 were not willing to pay the bribe amount to the appellant, the defacto complainant lodged a complaint (Ex.P15), dated 10.09.2009, at about 08.30 a.m., to PW18-Deputy Superintendent of Police, V&AC, Salem/Investigating Officer. PW18 received the complaint, registered FIR in Crime No.13/AC/2009 (Ex.P16), for offence under Section 7 of the Act and made arrangement for conducting trap to nab the appellant.



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2.4. For the purpose of trap proceedings, PW18 requested PW2- Assistant Executive Engineer, TNEB, Sooramangalam Branch Office and one Shanmugham, Special Tahsildar (Flying Squad), Salem. Thereafter, PW2 and the said Shanmugham were appraised of the case details by furnishing the complaint (Ex.P15) and FIR (Ex.P16). Thereafter upon enquiry by PW18, the defacto complainant produced a sum of Rs.10,000/- (MO12) in the denomination of three one thousand and fourteen five hundred rupee currency notes, which was smeared with phenolphthalein powder and handed over to PW2 to put the same in his wire bag. Thereafter, PW18 gave instructions to the defacto complainant to meet the appellant at his house in Ayyanthirumaligai Housing Board Quarters and give the money only on demand and also gave instructions to come out of the house of the appellant and give signal. The defacto complainant contacted the appellant through cell phone, who informed the defacto complainant to meet him at about 12.30 noon at his house. PW18 gave instructions to the defacto complainant to proceed to the house of the appellant in his TVS 50 moped along with PW2. PW18 and other officials followed the TVS 50 moped. At about 12.25 noon, the defacto complainant reached the building in which the house of the



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appellant is situated, the rest of the raiding party positioned themselves near the vicinity. After sometime, the defacto complainant returned and informed that the appellant instructed him to come to Malar Hotel at Yercaud Road.

2.5.The defacto complainant and PW2 reached Malar Hotel at about 12.55 noon. At about 01.10 p.m., the appellant came in a motor cycle, met them in front of Malar Hotel and instructed the defacto complainant to meet him at his house alone, leaving behind PW2 in the same place. At about 01.20 p.m., the defacto complainant went to the house of the appellant and the trap team waited for the prearranged signal from the defacto complainant. At about 01.12 p.m., the defacto complainant gave prearranged signal to the trap team and the trap team proceeded towards the house of the appellant. Meanwhile, the appellant came out hurriedly and proceeded to Sri Sugavaneshwarar Temple in his Hero Honda Splendor bike. The defacto complainant informed PW18 that as per the instructions of the appellant he placed the tainted bribe amount (MO12) in the yellow colour nylon bag held by the appellant.



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2.6. At about 02.10 p.m, the defacto complainant and the trap team went to the office of the appellant. The defacto complainant identified the appellant, who received the money, thereafter, PW18 conducted phenolphthalein test on the hands of the appellant, which turned positive and collected the washes in bottles (MO3 & MO4) sealed and labelled. PW18 conducted phenolphthalein test on the pant pocket and shirt pocket of the appellant, all the test proved positive, PW18 collected the resultant solutions in the bottles (MO5 to MO7). MO8 and MO9 are the full sleeve shirt and pant of the appellant which were subjected to phenolphthalein test. Thereafter, PW18 searched the yellow colour nylon bag found on the table of the appellant and conducted phenolphthalein test inside portion of the bag, PW18 collected the resultant solution in the bottle (MO10) and recovered yellow colour nylon bag (MO11). Following the trap proceedings, PW18 enquired for the tainted bribe amount given by the defacto complainant, the appellant replied that he did not receive any amount from the defacto complainant. Thereafter, PW18 conducted search in the office room of the appellant, found a wad of currency notes beneath the table of the appellant. PW18 collected the currency notes in the presence of PW2 and other witnesses,



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verified the serial numbers in the currency notes with Entrustment Mahazar (Ex.P2), which tallied, but found one five hundred currency note missing. When PW18 enquired the same, the appellant informed that on the way to his office, he took meal in Meenakshi Mess situated near Ellaipidari Amman Temple, and for the bill amount of Rs.30/-, he tendered a five hundred rupee currency note and received the balance amount of Rs.470/- and this balance amount found along with the other currency notes.

2.7. On further enquiry, PW18 seized the file (Ex.P3), Attendance Register (Ex.P4) from the office of the appellant for the purpose of investigation, prepared post-trap mahazar (Ex.P5), which was attested by the official witnesses PW2, Shanmugham and PW18. Thereafter, PW18 recovered the missing one five hundred currency note from PW4- Advocate through the Mahazar (Ex.P7), which was attested by the official witnesses PW2, Shanmugham, PW3 and PW4. On 11.09.2009, the appellant was remanded to judicial custody and as per the instructions of superiors, PW18 handed over the investigation to PW19- Deputy Superintendent of Police, Namakkal for further investigation.



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2.8.PW19 took up further investigation, recorded the statement of the witnesses under Section 161 Cr.P.C., collected call details (Ex.P12) from the competent authority, sent the relevant case properties to Forensic Science Laboratory, Chennai for analysis, received the chemical analysis report (Ex.P21), after completion of investigation, submitted the case file to PW1, the then Secretary of HR&CE Department. On perusal of the same, PW1 accorded sanction for prosecution (Ex.P1) for offence under Sections 7 and 13(2) r/w 13(1)(d) of the Act. PW19 filed the charge sheet before the trial Court and the same was taken on file as Special C.C.No.57 of 2014.

3.Before trial Court, the prosecution examined 20 witnesses as PW1 to PW20, marked 21 exhibits Exs.P1 to P21 and Material Objects MO1 to MO12. On the side of the defense, no witness examined and no document marked.

4.On conclusion of the trial, the learned trial Judge put incriminating materials to the appellant under Section 313 Cr.P.C., and the appellant denied the same. Upon appreciating the evidence let-in by



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the prosecution, the trial Court found the appellant guilty and convicted him as stated above. As against the conviction and sentence, appeal is filed.

5.The learned counsel for the appellant submitted that in this case admittedly, the defacto complainant passed away during trial, due to which, he could not be examined as witness on the side of the prosecution. In this case, when the alleged demand made by the appellant and handing over the bribe amount, non other than the defacto complainant was available. In view of non examination of defacto complainant, alleged demand and receipt of bribe amount not proved. The demand and acceptance of the bribe amount is *sine quo non* to convict a person under Sections 7 and 13(2) r/w 13(1)(d) of the Act. Admittedly, there is no evidence available in this case. In the absence of direct evidence, by way of circumstantial evidence, the same can be looked into. In this case, no such circumstantial evidence is also available. The accompanying witness (PW2) admits that he was not present during the alleged demand and handing of trap money. PW19, Trap Laying Officer confirms the same. Hence, the prosecution not



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proved the demand and acceptance of the bribe amount by the appellant which is *sine qua non*, affirmed by plethora of judgments by the Hon'ble Apex Court and this Court.

6.He further submitted that the defacto complainant projected a case that the alleged demand, prior to the trap made by the appellant on 08.09.2009 to his mobile No.9443698442 by the appellant from his mobile No.9443651378. PW13, the Sub Divisional Engineer (Sys.) Mobile Services (BSNL), Salem admits that there is no call between these two mobile numbers on 08.09.2009 which is confirmed from the Call Detail Records (Exs.P12). PW13 admits that the call details were retrieved from the computer device maintained in his office. Ex.P12 is an inadmissible document, since it is not certified under Section 65(B) of the Indian Evidence Act. The Hon'ble Apex Court in several cases held that retrieval of data from the computer has to be accompanied with certificate under Section 65(B) of the Indian Evidence Act. In the absence of the same, the same cannot be considered. He further submitted that motive projected by the prosecution through other witnesses, namely, PW5 to PW8, Gurukkals of Sri Raja Ganapathy



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Temple is that on 09.03.2009, the appellant joined as Executive Officer of the Temple within a day or two demand of Rs.10,000/- monthly made by the appellant which was refused by them. Subsequent to it, on 30.06.2009, PW5-Raja Gurukkal employed PW9 to do pooja unauthorizedly, for which a show cause notice issued to PW5 by the appellant. Further, on 22.08.2009, two Gurukkals, namely, PW10 and one Thirugnanasambantham employed temporarily by PW14, Chairman Board of Trustee for Vinayagar Chathurthi festival in anticipation of huge crowd. This was objected by the defacto complainant and PW5 to PW8 who all made sit-in-protest inside the temple. Due to which, a commotion arose. Later, temporary Gurukkals withdrawn, for which the appellant was contemplating disciplinary action. For these reasons, a demand of Rs.10,000/- is projected to have been made by the appellant.

7.The learned counsel for the appellant further submitted that PW5 to PW8 admitted that they had not gone along with the defacto complainant while lodging the complaint (Ex.P15) and they came to know about the trap proceedings only through evening newspaper. PW5 to PW8 stated that they contributed Rs.2,000/- each for the bribe amount,



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but no mention in the complaint (Ex.P15), which is a vital contradiction, the same not considered by the Trial Court. In this case, the bribe amount not recovered from the appellant. On the other hand, it is projected that the bribe amount was found beneath the table of the appellant. On enquiry, the appellant denied the demand of bribe amount and receipt of the same, hence, Section 20 of the Prevention of Corruption Act, 1988 would not come into play and it is for the prosecution to prove the case of demand and acceptance. In this case, PW2 and PW18 admit the bribe amount was recovered under the table. PW14, the Chairman, Board of Trustee, in his evidence stated that the Vigilance Police attempted to place currency notes inside the pocket of the appellant.

8.He further submitted that the prosecution attempts to justify phenolphthalein test answering positive on MO3 to MO9 by projecting as though on seeing the trap team, the appellant suffused both his hands and thereafter, placed his hands in his pant pockets and in his shirt pocket, which are highly artificial. Likewise, one of the 500 rupee note, which was found missing and later recovered from PW4 is also highly



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artificial. Added to it, PW4 categorically stated that PW3 had not identified him. In this case, no phenolphthalein test either on PW3 or PW4 to confirm that the missing 500 rupee note was handled and seized in the manner projected. The learned counsel further submitted that PW5 to PW8 though had stated that the demand for bribe started immediately after the appellant joining the duty as Executive Officer during March 2009, the said Gurukkals (PW5 to PW8) not made any complaint to any of the higher officials. Further, from Exs.P3, P10 & P11 it is confirmed that the charge memos were issued against Gurukkals. Hence, there was a clear motive against the appellant by Gurukkals (PW5 to PW8). The trial Court failed to advert to this aspect and consider the same during trial despite the appellant probalilized his defence.

9.The learned counsel further submitted that in the complaint (Ex.P15), there is mention about charge memo issued for the incident on 30.06.2009 and about sit-in-protest on 22.08.2009. In such circumstance, the Investigating Officer ought to have conducted investigation in this regard to find out the genuineness of the complaint. Admittedly, in this case, the appellant was not present on 22.08.2009



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when temporary Gurukkals were asked to do poojas. PW14, the Trustee admits that it was his decision to appoint and utilize the service of temporary Gurukkals to manage the crowd during Vinayagar Chathurthi festival. From the call detail records (Ex.P12), it can be seen that it is only the defacto complainant who made calls to the appellant on many occasions between 09.09.2009 and 10.09.2009. It was only on one occasion on 09.09.2009 and on two occasions, the appellant had called the defacto complainant. In the absence of the defacto complainant, no motive can be attributed for these calls. He further submitted that in this case, the alleged balance of Rs.470/- not produced. The evidence of PW2 and PW17 is that the trap amount (MO12) was found by PW18, Trap Laying Officer in the appellant's office and not by disclosure statement of the appellant, which the trial Court failed to consider the same.

10.In this case, from the Sanction Order (Ex.P1) though reference made with regard to the statement of the appellant, the same not produced by the prosecution. In the sanction order (Ex.P1), it is mentioned that the bribe amount was placed in a cotton bag. In this case,



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no such cloth bag seized and MO11 is a Nylon bag. PW1, the Sanctioning Authority admitted that prior to sanction, files and documents were perused by his Predecessor and he had only issued the Sanction Order (Ex.P1). As per Section 19 of the Prevention of Corruption Act, 1988, the sanctioning authority to personally get satisfied and accord sanction and not to accord sanction on his Predecessor's satisfaction. Hence, the Sanction Order (Ex.P1) is an invalid one. The learned counsel further submitted that in this case, the material objects (MO1 to MO12) submitted to the Court only on 14.09.2009 with delay of five days, for which, no reason given, which cast doubt on the genuineness of the materials forwarded. More so the manner in which the recovery proceedings recorded. In this case, admittedly, no signature of the appellant obtained in any of the material objects, more particularly, MO3 to MO7 and MO10.

11.He further submitted that the appellant rebutted the presumption by way of cross examination of witnesses and further he gave detailed explanation while questioning under Section 313 Cr.P.C. The trial Court failed to advert and consider the same before convicting



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the appellant. In view of the categorical admission by PW2 and PW19 that no one was present except the defacto complainant when the demand made and money handed over to the appellant, the primary requirement of demand, which is *sine qua non*, has not been proved. Thus, both by direct and circumstantial evidence, the prosecution failed to prove the case against the appellant. On the contrary, the trial Court convicting the appellant, is not proper.

12. In support of his submission, the learned counsel for the appellant relied on the following decisions:-

1. He placed reliance in the case of “*The State by the Inspector of Police, CBI/ACB/Chennai Versus V.Vaidiyalingam* reported in 2017 (2) MWN (Cr.) 439 (Mad)”, for the point that the demand of illegal gratification is *sine qua non* in constituting the offence under the Prevention of Corruption Act, 1988. Further, while invoking the provision of Section 20 of the Prevention of Corruption Act, the Court is required to consider the explanation offered by the accused if any only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. The learned counsel



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referred paragraph 19 of the decision, wherein it is observed that '*the Police have failed to obtain the signature of the accused on the label of the bottle contain the hand wash*'. Further, referred to paragraph 26, wherein this Court relied on the decision of the Apex Court in the case of “*V.Venkata Subbaroa Versus State reported in 2007 (3) SCC 175*”. In *V.Venkata Subbaroa* case, the Hon'ble Apex Court held that '*in the absence of a proof of demand, the question of raising the presumption would not arise. The Hon'ble Apex Court further held that Section 20 of the Prevention of Corruption Act, 1988 provides for raising of a presumption only if a demand is proved*'. Further, delay in producing the bottles containing the phenolphthalein test creates serious doubts on the prosecution case.

2.Further, he placed reliance in the case of “*State Versus G.Kaleeswaran reported in MANU/TN/3067/2020*” wherein this Court stressed the point that the purpose of verification of the antecedents of the accused is an important fact. In the present case, the complaint was lodged on 10.09.2009, at about 08.30 hours, at the same time, FIR was registered without any verification of the antecedents. Added to it, the



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appellant prior to posting in Sri Raja Ganapathy Temple as Executive Officer, he was employed in Sri Uppuliyappan Temple, Kumbakonam, where took stringent action against erring Gurukkals and was instrumental in augmenting the revenue of the temple. Further, the appellant was contemplating the issuance of tickets for special poojas for two wheeler and four wheeler and Abishegam, which was deterrent to the income of Gurukals therein. Thus, the trial Court failed to look into the antecedents of the appellant.

3.Placed reliance on the decision in the case of “***K.Gurusamy Versus State by Inspector of Police, Virudhunagar*** reported in ***CDJ 2020 MHC 1253***” for the point that based on the uncorroborated evidence of oral and documentary, no conviction can be imposed. Here, in this case, in the absence of the defacto complainant, the evidence of PW5 to PW8 as regards the alleged prior demand is only in the nature of hearsay, which is inadmissible. Added to it, from the recovery mahazar (Ex.P5), there is nothing to show that there was any demand made by the appellant.



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4.Placed reliance on the decision in the case of “***N.Vijayakumar Versus State of Tamil Nadu*** reported in ***(2021) 3 SCC 687***” for the point that mere possession and recovery of the bribe amount from the accused without proof of demand will not bring home the offence, further placed reliance on the decisions of the Hon'ble Apex Court in the cases of “***C.M.Sharma Versus State of A.P*** reported in ***(2010) 15 SCC 1*** and ***C.M.Girish Babu Versus CBI*** reported in ***(2009) 3 SCC 779***”. In this case, the trap amount was recovered beneath the table and not from the appellant.

5.In the case of “***K.Shanthamma Versus The State of Telangana*** reported in ***2022 LiveLaw (SC) 192***” it had held that the principle of demand of illegal gratification is *sine qua non* for establishing the offence under Section 7 and 13(1)(d) of the Prevention of Corruption Act.

13.*Per contra*, the learned Government Advocate (Crl. Side) appearing for the respondent Police submitted that in this case, the defacto complainant Saravana Gurukkal lodged the complaint (Ex.P15)



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on 10.09.2009, for which a case in Crime No.13/AC/2009 (Ex.P16) was registered. He further submitted that the complaint (Ex.P15) is a detailed one, wherein he referred to the witnesses PW5, PW6, PW7 & PW8, who are Gurukkals employed in Raja Ganapathy Temple. The appellant immediately after joining as Executive Officer in Sri Sugavaneshwarar Temple, demanded monthly payment from the said Gurukkals, who objected the same. Thereafter, a memo (Ex.P10) was issued to PW5 for employing his uncle's son PW9-Senthil Gurukkal on 30.06.2009 to perform pooja without permission, for which, a reply (Ex.P11) was also submitted by PW5. On 22.08.2009, without any order or approval, on their own, two temporary Gurukkals were allowed to perform pooja which was objected and thereafter, they were withdrawn. In this background, on 08.09.2009, the appellant called the defacto complainant from his mobile phone and informed that he would take disciplinary actions against the said Gurukkals (PW5 to PW8) and they were called to meet him on 09.09.2009. Pursuant to the same, at about 06.45 p.m, the defacto complainant along with PW6 met the appellant in his house and again, there was demand for monthly payment, failing which, disciplinary action would be taken against them and the defacto



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complainant was instructed to pay the money on the next day i.e., on 10.09.2009 by 03.00 p.m. Not willing to pay the bribe, the defacto complainant collected Rs.2,000/- each from PW5 to PW8 making it into Rs.10,000/- and lodged the complaint (Ex.P15) with PW18, who registered the FIR (Ex.P16) on 10.09.2009 at about 08.30 p.m., under Section 7 of the Act.

14. Thereafter, PW18 made arrangements for trap, requested the service of two official witnesses namely PW2-Assistant Executive Engineer, TNEB, Sooramangalam Branch Office and one Shanmugham, Special Tahsildar (Flying Squad), Salem. In presence of these persons, pre-trap proceedings were conducted and the same was recorded in the Entrustment Mahazar (Ex.P2) between 10.30 a.m to 11.30 a.m. On completion of the procedure, PW18 along with trap team and the official witnesses proceeded to the house of the appellant, who was staying in Ayyanthirumaligai Housing Board. PW2 and the defacto complainant alone were asked to meet the appellant. PW2 was instructed to over hear the conversation between the appellant and the defacto complainant. The other team members positioned themselves in the vicinity. The defacto



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complainant was called and informed by the appellant to come to Malar Hotel, Yercaud Road where the defacto complainant and PW2 went in TVS moped, following them, the trap team moved there and positioned themselves. The appellant came there and enquired about PW2 and instructed the defacto complainant to come alone to his house. Thereafter, defacto complainant alone went to the hosue of the appellant and the trap team again proceeded to the appellant's house and positioned themselves. The defacto complainant went under the stairs placed the bribe amount in the yellow nylon bag, which the appellant was holding, thereafter, came out and gave the prearranged signal, by the time, the appellant took his Hero Honda Splendor bike and left the place.

15.The trap team followed the appellant till the traffic signal point, from there, due to the traffic, the appellant could not be followed. After search, the trap team reached temple office at about 02.10 p.m., saw the appellant inside the office room. The defacto complainant identified the appellant and informed that he handed over the trap money to him and thereafter, he was asked to wait outside the office. PW18 along with PW2 and other trap team members enquired the appellant, the appellant



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was found nervous rubbing both his hands and placing the hands into his pant pocket in and out and thereafter, attempted to take some papers from his shirt pocket. PW18 conducted the phenolphthalein test on both hands of the appellant which turned pink in colour and the same were kept in a bottle, sealed and thereafter, his shirt and pant was removed. The shirt pocket and pant pocket washes taken which also turned positive. When the appellant was again enquired, he denied receiving any bribe amount. The defacto complainant was called to reconfirm the handing over of the bribe amount. The defacto complainant confirmed that on the instructions of the appellant, the bribe amount was placed in the yellow nylon bag, the bag was found on the table, which was also subjected to phenolphthalein test, which answered positive and search was made in the office room, currency notes found under the table and the same was collected, counted and verified with the Entrustment mahazar (Ex.P2). At that time, one 500 rupees note was found missing. On enquiry, appellant informed that on the way back to his office, he had gone to Meenakshi Mess near Ellaipidariamman Temple and paid rupees 500 and collected the balance amount of Rs.470/- for having his lunch. Thereafter, the appellant was arrested at about 04.30 p.m.



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16.PW18 instructed PW17 to proceed to Meenakshi Mess and recover the amount. In the meanwhile, the Recovery Mahazar (Ex.P5) recorded. PW17 met PW3, the owner of Meenakshi Mess enquired with him about receipt of 500 rupee note. PW3 produced eleven 500 rupee notes which was in the cash box, verified and found available notes did not tally with the missing 500 rupee note and thereafter, PW3 was again enquired who later recollected and informed that PW4, an Advocate along with two of his friends had come there had lunch and paid Rs.1,000/- and taken back the balance and the missing 500 rupee note might be handed over to him. This fact was informed by PW17 to PW18. PW18 along with PW2, the appellant and other trap team members reached Meenakshi Mess, from there, they had proceeded to the combined Court complex, where they found PW4 along with some of his friends chatting near a bunk shop. PW4 was enquired, who produced the 500 rupee note from his purse which tallied with the missing note, thereafter, the mahazar (Ex.P7) was prepared and 500 rupee seized. Thereafter, the appellant, PW2, PW18 and other trap team proceeded to the office. In the meanwhile, search was conducted at the residence of the appellant and nothing incriminating material seized. Thereafter, the



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appellant was produced before the Magistrate and remanded to judicial custody. PW18 handed over the investigation to PW19, who took up further investigation, recorded the statement of witnesses and submitted the Material Objects to the Court, which was forwarded to the Forensic Science Laboratory, Chennai for chemical analysis. PW20 is the Forensic Scientific Officer, who gave the report (Ex.P21) confirming the presence of phenolphthalein test. In this case, PW13 is the Sub Divisional Engineer of BSNL Department, who produced the call details report (Ex.P12), from the report, it is seen that the appellant had frequent contacts with the defacto complainant confirming the demand. Thereafter, appointing authority (PW1) was approached for sanction. PW1 issued the Sanction Order (Ex.P1). On completion of investigation, charge sheet filed before the trial Court. During trial, the trial Court examined PW1 to PW20 marked Exs.P1 to P21 and MO1 to MO12. The trial Court on the evidence and materials produced, convicted the appellant as stated above.

17.He further submitted that the defacto complainant passed away during trial, hence, in this case, he could not be examined. PW2 is the



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accompanying witness who clearly narrated the sequence of the trap.

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The demand of the money is proved by the evidence of PW5 to PW8 who paid the trap amount through the defacto complainant. Further, from the evidence of PW10, it is seen that the practice of having temporary Gurukkals by permanent Gurukkals was in vogue, objection has been taken by the appellant and memo issued for the incident on 30.06.2009. Further, for the sit-in-protest on 28.08.2009, disciplinary action contemplated and to square up the issue, demand of Rs.10,000/- was made. In the complaint (Ex.P15), there is mention about the demand made by the appellant on three occasions and finally, the demanded bribe amount handed over on 10.09.2009. The trap amount had been recovered from the appellant's office and the recovered trap amount confirmed the defacto complainant handing over the bribe amount and appellant receiving the same. PW20, the Scientific Officer confirms the phenolphthalein test. Since the defacto complainant passed away, the demand is proved by circumstantial evidence, which the trial Court accepted and convicted the appellant. Hence, he prayed for dismissal.



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18.This Court considered the rival submissions and perused the materials available on record.

19.It is not in dispute that in this case, the defacto complainant passed away during trial, hence, he could not be examined as a witness on the side of the prosecution. On the day of trap i.e., on 10.09.2009, initially defacto complainant and PW2/official witness proceeded to the house of the appellant and waited for him. On receiving the message from the appellant asking defacto complainant to come to Malar Hotel, Yercaud Road, both the defacto complainant and PW2 had gone there in TVS moped, where the appellant is said to have instructed the defacto complainant to come alone to his residence. PW2 was dropped there and he joined the trap team and proceeded to the house of the appellant. PW2 along with another official witness Shanmugam, Tahsildar, PW17/Inspector of Police, Vigilance and Anti Corruption, PW19/Trap Laying Officer and other trap team members proceeded to the house of the appellant in an Auto, two wheeler, Bolero Jeep and positioned themselves 140 meter away from the appellant's house. The undisputed evidence of the witnesses is that from the place of positioning, they could



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not see the appellant or the defacto complainant. From the evidence and materials, it is seen that the defacto complainant had gone under the stairs, at that time, placed the bribe amount of Rs.10,000/- in yellow bag held by the appellant. Thereafter, defacto complainant came out and gave the prearranged signal, by the time, the appellant left to temple office in his motor bike and moved away. The trap team consisting of PW2, PW17, PW19 and others followed the appellant in their respective vehicles, but they lost track of the appellant due to traffic. For one hour, they made frantic search and finally, at about 02.10 p.m., they reached temple office where they found the appellant sitting in his table and doing his work. Thus, it is clear that there is no evidence to prove the fact that the appellant made the demand for bribe and he received the same from the defacto complainant.

20.Looking for other circumstances, it is seen that on the day of trap i.e., on 10.09.2009, at about 02.10 p.m., when the appellant was found in his office room, PW2 & PW19 entered the office room along with the defacto complainant. The defacto complainant informed that he handed over the bribe amount to the appellant. Here, a theory has been



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propounded that on seeking the trap team, the appellant became nervous, started to rub his hands placing in his pant pocket and shirt pocket. This is obviously to show that the trap money has been handled by the appellant using his hands and thereby, he came into contact with the phenolphthalein powder smeared on the trap amount, which got into pant and shirt pocket.

21.It is seen that the appellant right from the initial questioning denied the receipt of trap amount from defacto complainant. Added to it, the amount was not recovered in person from the appellant. Initial search on the table, cupboard and other places, yielded no result and thereafter, the trap amount was found beneath the table and the same was recovered. It is also seen that one 500 rupee note was found missing when the recovered amount compared with Entrustment Mahazar (Ex.P2). Thereafter, PW17 was instructed to proceed to Meenakshi Mess near Ellaipidari Ammam Temple where PW3 was enquired and missing amount could not be found. Later, PW3 informed that PW4 along with his friends came, had lunch, paid Rs.1,000/-, to whom, he handed over one 500 rupee note along with balance amount. On getting this



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information, PW4 was enquired, who said to have produced the 500 rupee note from his purse, which tallies with the Enstrument Mahazar (Ex.P2). PW4 is categorical that he has not met PW3 and it was one Jayakumar, son of PW3, came there along with PW17. For what reason, the said Jayakumar not examined by the prosecution is not known. This vital contradictory evidences of PW3 and PW4 has to be further scrutinized. From the evidence of PW3, nowhere he stated about the appellant came to his Meenakshi Mess and had lunch. On the other hand, a leading question was put by PW17 asking for the 500 rupee note which was handed over by the appellant. PW4 states that it is one Jayakumar along with Deputy Superintendent of Police came to the Court and asked for missing 500 rupee note. In such circumstances, it is to be seen whether the missing 500 rupee note recovered from PW4 or not. From the Recovery Mahazar (Ex.P7) though missing note particulars mentioned, it would have been proper for the Deputy Superintendent of Police to have conducted phenolphthalein test on the hands of PW3 and PW4 or on the missing note. In this case, no such exercise done. Further, no signature from the appellant found in Ex.P7. Hence, the recovery of 500 rupee note is doubtful and the chain of



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custody not properly and satisfactorily explained.

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22.As regards the Material Objects are concerned, all the Material Objects reached the Court with delay of 5 days on 14.09.2009, which is not disputed. Further to it, no signature from the appellant/accused was obtained in the Material Objects, more particularly, MO3 to MO11.

23.Now coming to the evidence of PW5 to PW8, who are Gurukkals in Sri Raja Ganapathy Temple where the appellant was the Executive Officer. The evidence of PW5 to PW8 are to be taken with a pinch of salt since they had grudge against the appellant. Prior to trap, earlier memo (Ex.P10) issued for disciplinary action to PW5 for the reason that PW5 allowed PW9-Senthil to do poojas unauthorizedly on 30.06.2009. For Ex.P10, a reply (Ex.P11) was given by PW5. Added to it, it is not in dispute that on 22.08.2009, two temporary Gurukkals, namely, PW10 and one Thirugnanasambandham were asked to perform duty as Gurukkal in Sri Raja Ganapathy Temple by PW14, the Chairman and Board of Trustee anticipating huge crowd during Vinayagar Charthurthi festival. The defacto complainant and PW5 to PW8 made



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objections and held sit-in-protest. The act of the Gurukkals (PW5 to PW8) was against the custom which create resentment among the public. It is to be seen that the appellant while serving in Uppuliyappan Temple, Kumbakonam, he took stringent action against Gurukkals therein for revenue seepage, which was objected by Gurukkals therein since their revenues got affected. Likewise, the appellant was contemplating to introduce tickets for Abishegam and various poojas, which would have definitely affected the interest of the Gurukkals, namely, the defacto complainant and PW5 to PW8. Hence, prior to the trap, the defacto complainant and PW5 to PW8 had strong motive against the appellant. Hence, the evidence PW5 to PW8 cannot be relied upon.

24.Though the evidence of PW5 to PW8 that they have all contributed Rs.2,000/- each for the trap amount, there is no mention about the same in the complaint (Ex.P15). It is also seen that PW5 to PW8 all in one voice stated that they came to know about the trap proceedings only through the evening newspaper on 10.09.2009. From Ex.P15, it is seen that Gurukkals in Sri Raja Ganapathy Temple were not happy in the way the appellant was functioning as Executive Officer of



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the said temple. Hence, it would have been appropriate that the Investigating officer/PW18 before registering the complaint to have conducted discrete enquiry to confirm the antecedents and reputation of the appellant. In this case, no such exercise done by PW18 before registering FIR (Ex.P16). The complaint (Ex.P15) was lodged at about 08.30 a.m., on 10.09.2009, immediately thereafter, the FIR (Ex.P16) was registered without any study of previous antecedents of the appellant.

25.As regards the Sanction Order (Ex.P1) is concerned, the evidence of Sanctioning Authority (PW1) is that, PW1's predecessor had already dealt with the file and come to the satisfaction for according sanction for prosecution against the appellant, but he got transferred. Thereafter, PW1 on seeing the earlier notings in the file, accorded Sanction Order (Ex.P1), which is not proper. As per Section 19 of the Act, it is clear that the person who accords sanction has to personally get satisfied on the materials produced before him and for that reason only, Sanction Orders to be issued in first person. In this case, the Sanction Order (Ex.P1) has been issued by PW1 based on the satisfaction of his Predecessor and not on his satisfaction. This fact has not been



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considered by the trial Court.

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26.The evidence of PW13, Sub Divisional Engineer (Sys) Mobile Serves (BSNL), Salem and Call Detail Records (Ex.P12) confirm that mostly it is the defacto complainant, who made phone calls to the appellant and one or two occasions only, the appellant called the defacto complainant. In this case, admittedly, the certificate under Section 65(B) of the Indian Evidence Act not produced. In view of same, the Call Detail Records (Ex.P12) cannot be accepted and the evidence of PW13 is of no consequence. The trial Court not adverted or whispered to the detailed explanation given by the appellant during questioning under Section 313 Cr.P.C.

27.Be that as it may. In this case, the undisputed and admitted fact is that the defacto complainant passed away during trial, hence, he could not be examined as witness on the side of the prosecution. From the evidence of PW2 and PW19 and other materials, it is not in dispute that the defacto complainant had gone alone to the resident of the appellant and what transpired between the defacto complainant and the appellant,



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is not known and nobody is aware about the same. Added to it, the defacto complainant projected the case that on 08.09.2009, the appellant called him and asked to meet with Rs.10,000/- to cancel the memo (Ex.P10) and not to take any action for sit-in-protest held on 28.08.2009.

28.In this case, there is no material to show any demand by the appellant before receipt of the bribe amount. The feeble attempt by the prosecution to project PW5 to PW8 were aware about the previous demand made by the appellant immediately after joining the duty as Executive Officer of Sri Sugavaneshwarar Temple during March 2009 and for the subsequent events on 30.06.2009 and 28.08.2009 are all later improvements. In this case, admittedly, PW5 to PW8 examined only on 20.09.2009 by PW19, which is nineteen days after the trap. Prior to it, there is no whisper about any demand in whatsoever form. Thus, the defacto complainant, PW5 to PW8 had clear motive against the appellant.

29.Thus, in this case, there is no evidence or material available to show that there was demand by the appellant and on such demand, the



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bribe amount was paid by the defacto complainant. It is settled law that if the foundation is removed, the structure falls and that the legal maxim “*sub lato fundamento cadit opus*” squarely applies in the instant case. The Hon'ble Apex Court in the case of “***K.Shanthamma Vesus The State of Telangana*** reported in ***2022 LiveLaw (SC) 192***” categorically held that the proof of demand of bribe by the public servant and its acceptance by him is *sine qua non* for establishing the offence under Section 7 of the Prevention of Corruption Act, 1988. The Constitutional Bench of the Hon'ble Apex Court in a reference (***Neeraj Dutta Versus State (Govt. of N.C.T of Delhi)*** reported in ***2022 LiveLaw (SC) 1029***), summarizes as follows:

“68. What emerges from the aforesaid discussion is summarised as under:

(a) Proof of demand and acceptance of illegal gratification by a public servant as a fact in issue by the prosecution is a *sine qua non* in order to establish the guilt of the accused public servant under Sections 7 and 13 (1)(d) (i) and(ii) of the Act.

(b) In order to bring home the guilt of the accused, the prosecution has to first prove the demand of illegal gratification and the subsequent acceptance as a matter of



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fact. This fact in issue can be proved either by direct evidence which can be in the nature of oral evidence or documentary evidence.

(c) Further, the fact in issue, namely, the proof of demand and acceptance of illegal gratification can also be proved by circumstantial evidence in the absence of direct oral and documentary evidence.

(d) In order to prove the fact in issue, namely, the demand and acceptance of illegal gratification by the public servant, the following aspects have to be borne in mind:

(i) if there is an offer to pay by the bribe giver without there being any demand from the public servant and the latter simply accepts the offer and receives the illegal gratification, it is a case of acceptance as per Section 7 of the Act. In such a case, there need not be a prior demand by the public servant.

(ii) On the other hand, if the public servant makes a demand and the bribe giver accepts the demand and tenders the demanded gratification which in turn is received by the public servant, it is a case of obtainment. In the case of obtainment, the prior demand for illegal gratification emanates from the public servant. This is an offence under Section 13 (1)(d)(i) and (ii) of the Act.

(iii) In both cases of (i) and (ii) above, the offer by



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the bribe giver and the demand by the public servant respectively have to be proved by the prosecution as a fact in issue. In other words, mere acceptance or receipt of an illegal gratification without anything more would not make it an offence under Section 7 or Section 13 (1)(d), (i) and (ii) respectively of the Act. Therefore, under Section 7 of the Act, in order to bring home the offence, there must be an offer which emanates from the bribe giver which is accepted by the public servant which would make it an offence. Similarly, a prior demand by the public servant when accepted by the bribe giver and inturn there is a payment made which is received by the public servant, would be an offence of obtainment under Section 13 (1)(d) and (i) and (ii) of the Act.

(e) The presumption of fact with regard to the demand and acceptance or obtainment of an illegal gratification may be made by a court of law by way of an inference only when the foundational facts have been proved by relevant oral and documentary evidence and not in the absence thereof. On the basis of the material on record, the Court has the discretion to raise a presumption of fact while considering whether the fact of demand has been proved by the prosecution or not. Of course, a presumption of fact is subject to rebuttal by the accused and in the absence of rebuttal presumption stands.



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(f) In the event the complainant turns 'hostile', or has died or is unavailable to let in his evidence during trial, demand of illegal gratification can be proved by letting in the evidence of any other witness who can again let in evidence, either orally or by documentary evidence or the prosecution can prove the case by circumstantial evidence. The trial does not abate nor does it result in an order of acquittal of the accused public servant.

(g) In so far as Section 7 of the Act is concerned, on the proof of the facts in issue, Section 20 mandates the court to raise a presumption that the illegal gratification was for the purpose of a motive or reward as mentioned in the said Section. The said presumption has to be raised by the court as a legal presumption or a presumption in law. Of course, the said presumption is also subject to rebuttal. Section 20 does not apply to Section 13 (1) (d) 27 (i) and (ii) of the Act.

(h) We clarify that the presumption in law under Section 20 of the Act is distinct from presumption of fact referred to above in point (e) as the former is a mandatory presumption while the latter is discretionary in nature."

From the above, it is clear that in the event the complainant turns hostile or died or is unavailable to let in his evidence during trial, demand of



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illegal gratification can be proved by letting in the evidence of any other witness who can again let in evidence, either orally or by documentary evidence or the prosecution can prove the case by circumstantial evidence.

30. Here, in the present case, the defacto complainant died, due to which, he could not be examined and thereby, there is no direct evidence. As regards the other witnesses are concerned, as discussed above, the evidence of other witnesses [the shadow witness (PW2), Gurukkals (PW5 to PW8), Trap Laying Officer (PW18), Investigating Officer (PW19), Sanction Order witness (PW1), witness for Call Detail Records (PW13) and PW3 & PW4] and documentary evidence, does not form a chain of link leading to irresistible conclusion by way of circumstantial evidence.

31. Thus, even by way of circumstantial evidence either orally or by documentary evidence, it cannot be conclusively held the demand and acceptance of bribe amount by the appellant is proved.



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32.This is a case where the demand of illegal gratification by the appellant not proved by the prosecution. The demand, which is *sine qua non* for establishing the offence under Sections 7 and 13(1)(d) of the Act, is not proved.

33.In view of the above discussions, this Court set asides the judgment, dated 14.10.2016 passed by the learned Special Judge, Special Court for Trial of cases under the Prevention of Corruption Act, Salem in Special C.C.No.57 of 2014. Accordingly, this Criminal Appeal is allowed. The appellant is acquitted of all the charges framed against him.

34.The fine amount, if any, paid shall be refunded. Bail bond, if any, executed shall stand cancelled.

24.05.2023

Speaking order/Non-speaking order

Neutral Citation: Yes/No

Index: Yes/No

Internet: Yes/No

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M.NIRMAL KUMAR, J.

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To

- 1.The Special Court for Trial of cases
under the Prevention of Corruption Act,
Salem.
- 2.The Deputy Superintendent of Police,
Vigilance and Anti-Corruption,
Salem.
- 3.The Public Prosecutor,
High Court, Madras.

PRE-DELIVERY JUDGEMENT IN
Crl.A.No.755 of 2016

24.05.2023