

IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD

SITTING AT LUCKNOW

Neutral Citation No. - 2024:AHC-LKO:4137

RESERVED

Judgment reserved on 22.11.2023

Judgment delivered on 16.01.2024

Court No. - 27

Case :- CRIMINAL APPEAL No. - 1553 of 2023

Appellant :- Basant Kumar Bihani

Respondent :- State Union Of India, Thru. C.B.I./A.C.B./Lucknow

Counsel for Appellant :- Pranjal Krishna

Counsel for Respondent :- Shiv P. Shukla

Hon'ble Subhash Vidyarthi J.

1. Heard Sri Pranjal Krishna, the learned Counsel for the appellant and Sri Shiv P. Shukla, the learned Counsel for the respondent-C.B.I.
2. The instant Appeal has been filed challenging the validity of the judgment and order dated 31.03.2023 passed by the learned Special Judge (Prevention of Corruption Act), CBI Court No. 3, Lucknow in Criminal Case No. 02 of 2011 titled State versus Basant Kumar Bihani, arising out of RC No. 0062010A002 under Sections 7 and 13 (2) read with 13 (1) (d), Prevention of Corruption Act, 1988 (hereinafter referred to as 'the Act'), Police Station CBI/ACB, Lucknow.
3. Briefly stated, facts of the case are that Sri Murad Ali, husband of the complainant Noor Fatima, had died on 10.04.2004. On 20.07.2004 Noor Fatima had given a letter stating that she will apply for compassionate appointment of her elder daughter Khushboo as soon as she attains majority. On 02.12.2006 she gave another letter stating that though the elder daughter had attained majority, she did not want to accept compassionate appointment as she wanted to pursue higher studies and she requested that her elder daughter be given appointment after she completes higher studies. On 30.05.2007, Noor Fatima gave another letter stating that as her elder daughter was keen

to pursue higher studies, a seat be kept reserved for the younger daughter till she attains majority and completes her education. On 09.05.2008 the appellant's predecessor sent a reply stating that as per the Rules, the younger daughter could not be appointed and the complainant herself can take the appointment.

4. The complainant gave another letter on 04.06.2008 stating that her elder daughter was getting married and the name of her younger daughter Roshni be registered for compassionate appointment.
5. In furtherance of the appellant's comments, his subordinate officer replied on 21.02.2009 that the above request was not as per the rules.
6. The complainant again gave letters dated 09.10.2009 & 10.04.2009 requesting for registration of the name of her younger daughter Roshni for the appointment and the appellant had rejected the request by writing a note on the letter itself.
7. At 05:59 p.m. on 07.10.2010, the complainant sent a complaint through fax, alleging that some unknown person had met her as a messenger of the appellant and had asked her to talk to the appellant with respect to the appointment of her daughter. She stated that some calls took place during the period 01.01.2010 and 07.01.2010 between the appellant and herself, wherein the appellant had demanded Rs.2,50,000/- as bribe for compassionate appointment of her second daughter. On the aforesaid complaint, the C.B.I. registered a First Information Report (FIR) at 06:30 p.m. on 07.01.2010.
8. On 08.10.2010 a team of C.B.I. officers reached Varanasi for trap proceedings. It arranged two independent witnesses from State Bank of India. Pre-trap proceedings started in SBI Guest House at Sagra, Varanasi at 05:30 p.m. the complainant reached the guest house between 06:00 to 06:15 p.m. and the pre-trap proceedings concluded at 07:15 p.m. and the C.B.I. team left for the official bungalow of the appellant.
9. The trap proceedings were conducted between 08:00 and 08:15 p.m. and the C.B.I. claims to have caught the appellant red handed while demanding and accepting from the complainant Smt. Noor Fatima bribe of Rs. 50,000/-, under impression of the same being Rs.2,50,000/-. A charge sheet was filed against the appellant u/s 7 and 13(2) r/w 13(1)(d) of the Act on 20.01.2011.

- 10.** On 18.07.2011 the Trial Court had framed the following charges against the appellant: -

Firstly, that in the year 2010, the appellant was working as Chief Commercial Officer, Locomotive Workshop, Railway, Varanasi and he had demanded Rs.2,50,000/- from the complainant Noor Fatima, as bribe for giving compassionate appointment to her younger daughter. As the complainant had only Rs 50,000/-, on 08.01.2010 the C.B.I. team arranged the Rs 50,000/- in five packets in such a manner as would make it appear five packets of Rs. 500/- each (total Rs.2,50,000/-) and a C.B.I. team arrested him red handed while taking bribe on 08.01.2010 and recovered the said amount of Rs 50,000/- from him. Thus the appellant committed an offence punishable under Section 7 of the Act.

Secondly, that on the above mentioned date, time and place, the appellant received an amount of Rs 50,000/- from the complainant Noor Fatima in the above manner, illegally in a corrupt manner and by misusing his position and benefitted himself financially, which is a criminal offence and thus he committed an offence punishable under Section 13 (2) read with Section 13 (1) (d) of the Act 1988, of which cognizance had been taken by the court.

- 11.** Prosecution examined 15 witnesses and adduced some documentary evidence. Statement of the appellant was recorded under Section 313 Cr.P.C. and he produced 5 defense witnesses and 33 documents.
- 12.** The Learned Trial Court had framed the following points for determination: -
- I. Whether the accused is a public servant and if yes, whether the competent authority had granted sanction for his prosecution in accordance with the law?
 - II. Whether the accused had demanded and accepted bribe for making compassionate appointment of the complainant's daughter?
 - III. Whether the matter of compassionate appointment of the complainant's daughter was pending before the applicant and whether he was competent to take a decision thereon?
 - IV. Whether the amount of bribe received by the accused had been recovered by the CBI team from him?

13. The Trial Court decided all the points against the appellant and convicted him for commission of offence under Section 7 of the Act and has sentenced him to undergo rigorous imprisonment for 2 years and pay a fine of Rs. 40,000/- and in default in payment of fine to undergo additional rigorous imprisonment for 2 months. He has been convicted for committing the offence under Section 13(2) read with 13(1)(d) of the Act and has been sentenced to undergo rigorous imprisonment for 3 years and to pay a fine of Rs. 60,000/- and in default of payment of fine, to undergo rigorous imprisonment for additional 3 months.
14. The order of conviction and sentence passed by the trial Court has been assailed before this Court on the following grounds: -
- I. The F.I.R. was registered without verification of genuineness of the allegations leveled in the complaint.
 - II. The electronic evidence in the form of the compact discs containing copies of the conversations recorded in a Digital Voice Recorder, were not accompanied by certificates under Section 65 B of the Indian Evidence Act and the certificate was filed at a highly belated stage. Therefore, the electronic evidences were not admissible.
 - III. There was no witness of the demand and acceptance of bribe, apart from the complainant herself. In absence of a shadow witness having accompanied her and having corroborated her evidence, conviction cannot be based on the statement of the complainant alone, particularly when there are discrepancies in the statements.
 - IV. The presumption provided under Section 20 of the Act does not apply to Section 13 (1) (d) and it is a legal and rebuttable presumption.
 - V. The CBI officers have not acted fairly in this manner. They have tampered with the evidence and have concealed relevant evidence from the Court.
15. The learned Counsel for the appellant has relied upon the judgments of **Vineet Narain and others versus Union of India and another**, (1998) 1 SCC 226, **Lalita Kumari v. Govt. of U.P.**, (2014) 2 SCC 1, **Neeraj Dutta versus State (NCT Of Delhi)** 2022 SCC OnLine SC 1724, **Neeraj Dutta versus State (NCT Of Delhi)** 2023 SCC OnLine

SC 280, **K. Shanthamma versus State of Telangana**, (2022) 4 SCC 574, **Anvar P. V. versus P. K. Basheer and others**, (2014) 10 SCC 473 and **Arjun Panditrao Khotkar versus Kailash Kushanrao Gorantyal and others**, (2020) 7 SCC 1.

16. In support of the first submission that the F.I.R. was registered without verification of genuineness of the allegations leveled in the complaint, the learned Counsel for the appellant has relied upon the judgment in the case of **Lalita Kumari v. Govt. of U.P.**, (2014) 2 SCC 1, wherein the Hon'ble Supreme Court had issued the following directions: -

“120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

120.3. If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

- (a) *Matrimonial disputes/family disputes*
- (b) *Commercial offences*
- (c) *Medical negligence cases*
- (d) *Corruption cases*
- (e) *Cases where there is abnormal delay/latches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.*

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

120.8. Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.”

17. Para 120.7 of Lalita Kumari (Supra) has been modified by **Lalita Kumari v. State of U.P.**, (2023) 9 SCC 695, so as to make it as follows: -

“120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed fifteen days generally and in exceptional cases, by giving adequate reasons, six weeks’ time is provided. The fact of such delay and the causes of it must be reflected in the General Diary entry.”

18. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, only then a preliminary inquiry may be conducted to ascertain whether cognizable offence is disclosed or not but if the information discloses commission of a cognizable offence, registration of FIR is mandatory under Section 154 of the Code and no preliminary inquiry is permissible in such a situation. As the F.I.R. in the present case clearly discloses commission of a cognizable offence, there was no need for verification of the genuineness of the allegations leveled in the complaint. Accordingly, the first submission of the learned Counsel for the appellant that the judgment of the trial Court stands vitiated because the F.I.R. was registered without verification of genuineness of the allegations levelled in the complaint, cannot be accepted and the same is turned down.
19. The second submission of the learned Counsel for the appellant is that the electronic evidence in the form of compact discs containing the conversation recorded in a Digital Voice Recorder and call detail

records, was not accompanied by certificates under Section 65 B of the Indian Evidence Act and the certificates were filed at a highly belated stage and the electronic evidence was not admissible for this reason. The C.B.I. claims that the conversations between the complainant and the appellant were recorded in a Digital Voice Recorder and the same were copied on compact discs marked Q-1, Q-2 and Q-3 and transcripts of the conversations were marked as Q-4, Q-5 and Q-6 respectively and those were filed in the Court along with the charge-sheet on 20.01.2011.

20. Examination of PW-1 commenced on 18.08.2011 and it concluded on 21.12.2011. Examination of PW-2 started on 26.03.2013 but thereafter PW-2 did not appear on several dates and therefore, examination-in-chief of PW-3 was started on 07.03.2013, i.e. after almost 1 year, and it continued on 12.04.2013 and 13.05.2013. As PW-2 showed up on 30.05.2013, his examination-in-chief was resumed and it continued till 03.08.2015 and he was cross examined on 26.08.2015. After this examination in chief of PW-3 resumed on 10.09.2015 and she was cross examined on 23.09.2015. PW-4 to PW-9 were examined between 18.11.2015 to 31.01.2017.
21. On 22.04.2016 the appellant had filed an application for excluding the electronic record from consideration as it was inadmissible and when no decision was taken on the application, he filed another application dated 17.02.2017 for deciding the earlier application. On 22.03.2017, the trial Court passed an order that it was conducting the trial as per the law laid down in **Bipin Shantilal Panchal v. State of Gujarat**, (2001) 3 SCC 1, wherein it was held that *Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration.*
22. Thereafter the examination of the remaining prosecution witnesses continued. Examination-in-chief of PW-13 commenced on 08.05.2019

and it continued on 09.05.2019 and 31.05.2019 and during continuance of examination in chief of PW-13, an application was filed on 31.05.2019 for filing three certificates under Section 65-B of the Evidence Act and the same were taken on record vide order dated 25.11.2021 and those were marked as A-33, A-34 and A-35. On the appellant's objections, the trial Court passed an order dated 19.04.2022 that the certificates had merely been taken on record and the issue of admissibility was not considered at that stage.

23. The prosecution evidence stood closed on 15.12.2022 and the case was fixed for examination of the accused under Section 313 Cr.P.C. The accused remained present in the Court on 11 dates, but he was not examined. The prosecution moved several applications for summoning an additional witness and a witness who had not appeared despite service of summons and then an application dated 31.01.2023 was filed for taking a certificate dated 24.01.2023 regarding call detail records on record. The appellant had opposed the application, but the certificate was taken on record vide order dated 01.02.2023.
24. Section 65 B of the Evidence Act provides as follows: -

“65-B. Admissibility of electronic records.—(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, **without further proof or production of the original**, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely—

- (a) ***the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;***
- (b) ***during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;***

- (c) *throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and*
- (d) *the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.*

(3) * * *

(4) *In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—*

- (a) *identifying the electronic record containing the statement and describing the manner in which it was produced;*
- (b) *giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;*
- (c) *dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,*

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) * * *. ”

(Emphasis supplied)

25. In Anvar P. V. v. P. K. Basheer, (2014) 10 SCC 473, the Hon’ble Supreme Court held that: -

“15. Under Section 65-B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

- (a) *There must be a certificate which identifies the electronic record containing the statement;*
- (b) *The certificate must describe the manner in which the electronic record was produced;*
- (c) *The certificate must furnish the particulars of the device involved in the production of that record;*
- (d) *The certificate must deal with the applicable conditions mentioned under Section 65-B(2) of the Evidence Act; and*
- (e) *The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.*

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.”

(Emphasis supplied)

26. In Shafhi Mohammad versus State of Himachal Pradesh, (2018) 2

SCC 801, the Hon’ble Supreme Court had held that: -

“29. The applicability of procedural requirement under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in the absence of certificate under Section 65-B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65-B(4) is not always mandatory.

30. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65-B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by the court wherever interest of justice so justifies.”

27. In Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1 the Hon’ble Supreme Court overruled the judgment in Shafhi Mohammad (Supra) so far as it held that “In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded” and held that: -

“45. Thus, it is clear that the major premise of Shafhi Mohammad that such certificate cannot be secured by persons

who are not in possession of an electronic device is wholly incorrect. An application can always be made to a Judge for production of such a certificate from the requisite person under Section 65-B(4) in cases in which such person refuses to give it.

** * **

*47. ...where the requisite certificate has been applied for from the person or the authority concerned, and the person or authority either refuses to give such certificate, or does not reply to such demand, the party asking for such certificate can apply to the court for its production under the provisions aforementioned of the Evidence Act, CPC or CrPC. Once such application is made to the court, and the court then orders or directs that the requisite certificate be produced by a person to whom it sends a summons to produce such certificate, the party asking for the certificate has done all that he can possibly do to obtain the requisite certificate. Two Latin maxims become important at this stage. The first is *lex non cogit ad impossibilia* i.e. the law does not demand the impossible, and *impotentia excusat legem* i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused.*

** * **

51. On an application of the aforesaid maxims to the present case, it is clear that though Section 65-B(4) is mandatory, yet, on the facts of this case, the respondents, having done everything possible to obtain the necessary certificate, which was to be given by a third party over whom the respondents had no control, must be relieved of the mandatory obligation contained in the said sub-section.

52. We may hasten to add that Section 65-B does not speak of the stage at which such certificate must be furnished to the Court. In Anvar P.V. this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the person concerned, the Judge conducting the trial must summon the person/persons referred to in Section 65-B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution

seeks to rely upon before commencement of the trial, under the relevant sections of the CrPC.

* * *

*56. Therefore, in terms of general procedure, **the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before commencement of the trial.** Thus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in respect of the rights of parties has to be carried out by the court, in examining any application by the prosecution under Sections 91 or 311 CrPC or Section 165 of the Evidence Act. **Depending on the facts of each case, and the court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, the court may in appropriate cases allow the prosecution to produce such certificate at a later point in time.** If it is the accused who desires to produce the requisite certificate as part of his defense, this again will depend upon the justice of the case — discretion to be exercised by the court in accordance with law.”*

(Emphasis supplied)

28. In **Arjun Panditrao Khotkar** (Supra), the Hon’ble Supreme Court quoted with approval the following approved the following view of the High Court of Rajasthan in **Paras Jain v. State of Rajasthan**, 2015 SCC OnLine Raj 8331: -

“15. Although, it has been observed by the Hon'ble Supreme Court that the requisite certificate must accompany the electronic record pertaining to which a statement is sought to be given in evidence when the same is produced in evidence, but in my view it does not mean that it must be produced along with the charge-sheet and if it is not produced along with the charge-sheet, doors of the court are completely shut and it cannot be produced subsequently in any circumstance. Section 65-B of the Evidence Act deals with admissibility of secondary evidence in the form of electronic record and the procedure to be followed and the requirements be fulfilled before such an evidence can be held to be admissible in evidence and not with the stage at which such a certificate is to be produced before the court. One of the principal issues arising for consideration in the above case before the Hon'ble Court was the nature and manner of admission of electronic records.

* * *

23. When legal position is that additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the court production of it is essential for the proper disposal of the case, how it can be held that the certificate as

required under Section 65-B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured along with the electronic record and not produced in the court with the charge-sheet. In my opinion it is only an irregularity not going to the root of the matter and is curable. It is also pertinent to note that certificate was produced along with the charge-sheet but it was not in a proper form but during the course of hearing of these petitioners, it has been produced on the prescribed form.”

29. The Hon’ble Supreme Court also approved the following view taken by a Division Bench of the Delhi High Court in **Kundan Singh versus State**, 2015 SCC OnLine Del 13647: -

“50. Anvar P.V. partly overruled the earlier decision of the Supreme Court on the procedure to prove electronic record(s) in Navjot Sandhu, holding that Section 65-B is a specific provision relating to the admissibility of electronic record(s) and, therefore, production of a certificate under Section 65-B(4) is mandatory. Anvar P.V. does not state or hold that the said certificate cannot be produced in exercise of powers of the trial court under Section 311 CrPC or, at the appellate stage under Section 391 CrPC. Evidence Act is a procedural law and in view of the pronouncement in Anvar P.V. partly overruling Navjot Sandhu, the prosecution may be entitled to invoke the aforementioned provisions, when justified and required. Of course, it is open to the court/presiding officer at that time to ascertain and verify whether the responsible officer could issue the said certificate and meet the requirements of Section 65-B.”

30. While approving the aforesaid view, the Hon’ble Supreme Court summarized the law on the point in **Arjun Panditrao Khotkar** (Supra) by stating that:-

“So long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the learned Judge at any stage, so that information contained in electronic record form can then be admitted, and relied upon in evidence.”

* * *

61. We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V., and incorrectly “clarified” in Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801. Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor (1875) LR 1 Ch D 426], which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is

admissible only if led in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose.

* * *

64. To obviate this, general directions are issued to cellular companies and internet service providers to maintain CDRs and other relevant records for the period concerned (in tune with Section 39 of the Evidence Act) in a segregated and secure manner if a particular CDR or other record is seized during investigation in the said period. The parties concerned can then summon such records at the stage of defense evidence, or in the event such data is required to cross-examine a particular witness. This direction shall be applied, in criminal trials, till appropriate directions are issued under relevant terms of the applicable licences, or under Section 67-C of the Information Technology Act, which reads as follows:

“67-C. Preservation and retention of information by intermediaries.—(1) Intermediary shall preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe.

(2) Any intermediary who intentionally or knowingly contravenes the provisions of sub-section (1) shall be punished with an imprisonment for a term which may extend to three years and also be liable to fine.”

73. The reference is thus answered by stating that:

73.1. Anvar P.V. , as clarified by us hereinabove, is the law declared by this Court on Section 65-B of the Evidence Act. The judgment in Tomaso Bruno, being per incuriam, does not lay down the law correctly. Also, the judgment in Shafhi Mohammad and the judgment dated 3-4-2018 reported as Shafhi Mohd. v. State of H.P. , do not lay down the law correctly and are therefore overruled.

73.2. The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. In cases where the “computer” happens to be a part of a “computer system” or “computer network” and it becomes impossible to physically bring such system or network to the court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4). The last sentence in para 24 in Anvar P.V. which reads as “... if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act ...” is thus clarified; it is to be read without the words “under Section 62 of the Evidence Act,...”. With this

clarification, the law stated in para 24 of Anvar P.V. [Anvar P.V. v. P.K. Basheer, does not need to be revisited.

73.3. The general directions issued in para 64 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67-C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers.

(Emphasis supplied)

31. In reply to this submission, the learned Counsel for the respondent – CBI has relied upon the judgment in the case of **State of Karnataka Versus T. Naseer alias Nasir alias Thandiantavida Naseer alias Umarhazi alias Hazi and Others**, 2023 SCC OnLine SC 1447, which arose out of serial bomb blasts in Bangalore on 25.07.2008, in which one woman had lost her life whereas several persons were injured. During the course of investigation certain electronic devices such as a Laptop, an external Hard Disc, 3 Pen Drives, 5 floppies, 13 CDs, 6 SIM cards, 3 mobile phones, one memory card and 2 digital cameras etc. were seized at the instance of an accused. The original electronic devices were submitted before the Trial Court along with the additional charge-sheet dated 09.06.2010. The Trial Court vide order dated 07.04.2017 ordered that the CFSL Report dated 29.11.2010 with reference to the electronic devices was inadmissible in evidence in the absence of a certificate under Section 65-B of the Act. The prosecution's case was that the original devices being already on record (as a primary evidence) and there was no requirement of a certificate under Section 65-B of the Act. Still, as a matter of abundant caution, a certificate under Section 65-B of the Act was obtained and when PW-189 was further examined in chief on 27.04.2017, a certificate under Section 65-B of the Act was sought to be produced. The Trial Court opined that the certificate issued under Section 65-B of the Act produced on 27.04.2017 was not admissible in evidence. The order of the Trial Court was upheld by the High Court. In appeal, the Hon'ble Supreme Court held that: -

“14. From the aforesaid facts, it cannot be inferred that there was delay of six years in producing the certificate. In fact, report

received from CFSL, Hyderabad on the basis of the contents of electronic devices dated 29.11.2010 was already placed before the Trial Court on 16.10.2012. In fact, the stand of the prosecution was that when the original electronic devices were already produced and marked MOs, there was no need to produce the certificate under Section 65-B of the Act. Still, as a matter of abundant caution, the same was produced that too immediately after objection was raised by the accused against the production of CFSL report prepared on the basis of the electronic devices seized.

15. Fair trial in a criminal case does not mean that it should be fair to one of the parties. Rather, the object is that no guilty should go scot-free and no innocent should be punished. A certificate under Section 65-B of the Act, which is sought to be produced by the prosecution is not an evidence which has been created now... ”

32. **T. Naseer** (Supra) was decided on the basis of the aforesaid peculiar facts where the primary electronic evidence had already been filed by the prosecution and the certificate under Section 65 B was not prepared later, whereas in the present case, the primary evidence in the shape of the Digital Voice Recorder had not been filed by the prosecution and the certificates filed in the present case had been created long after preparation and filing of the secondary evidence. Therefore, the judgment of **T. Naseer** (Supra) would not be applicable to the facts of the present case.
33. In the present case, the first conversation between the appellant and the complainant was through the mobile phone of the complainant, which was recorded on a CD-Q1. The complainant did not give her mobile phone to the Investigating Officer. The complainant did not state that she had prepared the CD. Nobody stated that he had prepared the CD-Q1. The two subsequent two conversations between the complainant and the appellant were recorded in a Digital Voice Recorder, and the Digital Voice Recorder was not produced in evidence before the Court. The recorded conversations were copied on compact discs marked Q-2 and Q-3 and transcripts of the three conversations were marked as Q-4, Q-5 and Q-6 respectively. The compact discs and transcripts of the conversations were filed in the Court along with the charge-sheet on 20.01.2011, but this secondary evidence was filed without the requisite certificate under Section 65 B of the Evidence Act.

34. On 22.04.2016 the appellant had filed an application for excluding the electronic record from consideration as it was inadmissible and when no decision was taken on the application, he filed another application dated 17.02.2017 for deciding the earlier application.
35. In Application under Section 482 Cr.P.C. No. 4939 of 2017 filed by the appellant, this Court had passed the following order on 10.08.2017: -

“Having regard to the rival submissions made by the parties, it is gathered that the court below while dealing with the matter has not delved into the admissibility of protection available under Section 62 of the Evidence act vis-a-vis the evidence of the complainant. The question which was raised before the court below is regarding the admissibility of electronic record as an evidence under Section 65B particularly when there was no certificate supporting the said evidence, as envisaged under law.

*The process of leading evidence under Section 62 and 65B stand at variance. **If the prosecution proceeds to adduce the evidence of C.D. and CDR, it would certainly require a certificate as per law propounded by the apex court which in any case has to be filed at the time of filing of evidence before the trial court.***

*This aspect of the matter deserves to be and shall be considered by the trial court as soon as the prosecution leads its evidence and in case the electronic record is placed reliance upon before the trial court, the same shall be entertained strictly within the principles laid down by the apex court in the judgment mentioned above. **In other words, such an evidence cannot be proceeded with unless a certificate has already been filed before the competent court.***

The trial court is, however, free to proceed with the evidence, in case the original device allegedly used in the recording of the voice is filed by the complainant through CBI and in that event the course open under law as per Section 62 of the Evidence Act shall remain open.”

36. During continuance of examination in chief of PW-13, an application was filed on 31.05.2019 for filing three certificate under Section 65-B of the Evidence Act and the same were taken on record vide order dated 25.11.2021 and the trial Court had passed an order dated 19.04.2022 that the certificates had merely been taken on record and the issue of admissibility was not considered at that stage.
37. Then an application dated 31.01.2023 was filed for taking a certificate dated 24.01.2023 regarding call detail records on records regarding six phone calls between the mobile numbers of the complainant and the

appellant during 01.01.2010 and 08.02.2010. The accused opposed the application on the ground that statement of the accused under Section 313 Cr.P.C. had been recorded on 20.01.2023 and the matter was at the stage of defence evidence. The defence had already produced three witnesses on 31.01.2023 and thereafter three dated had been fixed for defence evidence and the application filed at that stage was not maintainable. However, the trial Court allowed the application by merely stating that it was necessary in the interest of justice. The Court did not mention any exceptional circumstance justifying the certificate under Section 65 B being taken on record at the aforesaid belated stage.

38. The certificate dated 24.01.2023 was marked as Exhibit A-46 and it reads as follows: -

“Certified that the information pertaining to mobile number 97948616000 being produced is the computer generated record, which was produced by computers maintained by our company during the period when the said computer was used regularly to store and process information and the undersigned was having lawful control over the use of computer(s) and during the aforesaid period the information of this kind contained in electronic record is derived was regularly fed into the computer in the ordinary course of business and throughout the material part of the period when the said computer was operating properly and the information contained in the form of hard copy is an electronic record of which reproduces such information which was feed into the computer and to the ordinary course of business and there are no chances of tampering & manipulations.

That the information contains in the electronic record is automatically fed into the system in the ordinary course of business and the computer generated information is certifying to the best of my knowledge and beliefs.”

39. It is relevant to note that the certificate of the calls made between 01.01.2010 and 08.02.2010 was issued on 24.01.2023 and PW-15, who had issued the certificate, had stated that he was not in the service of the company between April 2015 to April 2018. Therefore, he could not have certified
40. A certificate under Section 65 B of the Evidence Act must accompany the electronic record when the same is produced in evidence by a person who is in a position to produce such certificate being in control of the said device. In the present case, the digital voice recorder was in control of CBI and, therefore, a certificate under Section 65 B of the

Evidence Act was mandatorily required to be filed along with the secondary evidence of electronic record, namely the compact discs containing copies of conversation recorded in the digital voice recorder and the transcript of that recorded conversation. The accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, including the certificate under Section 65 B of the Evidence Act.

41. Although the court may in appropriate cases allow the prosecution to produce such certificate at a later point in time, but in the present case, neither any reasons were assigned by the prosecution for not filing the certificate under Section 65 B of the Evidence Act along with the secondary evidence, nor was the certificates filed soon thereafter. The certificates were not filed even after the order dated 10.08.2017 passed by this Court in application under Section 482 Cr.P.C. No. 4939 of 2017 filed by the appellant. The trial Court has not assigned any reasons for taking the certificate regarding the Compact Discs on record at a highly belated stage, after more than 8 years and the certificate regarding Call Detail records after 13 years since filing of the charge-sheet and the documentary evidence.
42. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without the safeguards provided in Section 65 B (4) of the Evidence Act, the whole trial based on proof of electronic records can lead to travesty of justice. The certificates prepared after more than 8 and 13 years since filing of the documentary evidence cannot be said to fulfil the mandate of Section 65 B of the Evidence Act and the trial Court has erred in convicting the appellant on the basis of secondary electronic evidence filed without being accompanied by the requisite certificate under Section 65 B of the Evidence Act.
43. Therefore, I decide the second point in favour of the appellant by holding that applying to the law laid down by the Hon'ble Supreme Court in **Arjun Panditrao Khotkar** (Supra) to the facts of the present case, the secondary electronic evidence filed in the shape of CDs Q-1, Q-2, Q-3 and the transcript of conversation filed in the shape of Q-4, Q-5 and Q-6 was not admissible in evidence. Another CD - Q7 was

also filed, but no certificate under Section 65 B was filed regarding that CD and, therefore, CD - Q7 is inadmissible in evidence.

44. The third submission of the learned Counsel for the appellant is that there was no witness of the demand and acceptance of bribe, apart from the complainant herself. In absence of a shadow witness having accompanied her and having corroborated her evidence, conviction cannot be based on the statement of the complainant alone, particularly when there are discrepancies in the statements.
45. The point no. 2 framed by the trial Court for determination, was whether the appellant had demanded and accepted bribe from the complainant. It does not make a mention of the amount allegedly demanded as bribe and it also does not mention the amount allegedly given by the complainant and accepted by the appellant as bribe.
46. The discussion on this point in the judgment of the trial Court begins with the submissions made by the learned Counsel for the appellant, and not by discussing the prosecution case. Section 234, Cr.P.C. provides that: -

“234. Arguments.—When the examination of the witnesses (if any) for the defence is complete, the prosecutor shall sum up his case and the accused or his pleader shall be entitled to reply:

Provided that where any point of law is raised by the accused or his pleader, the prosecution may, with the permission of the Judge, make his submissions with regard to such point of law.”

47. It is only if the submissions made on behalf of the prosecution make out a case for conviction of the accused that the accused should be required to rebut the submissions. In case the prosecution fails to make out a case for conviction, there would be no necessity for the defence to advance any submissions. Therefore, the Court should deal with the submissions also in the aforesaid order. However, in the present case, the trial Court proceeded to consider the submissions of the defence first, without considering the submissions of prosecution, which indicates that the trial Court was proceeding in a manner which indicates that it had presumed the accused to be guilty and it had required the accused person to prove his innocence. This error in the basic approach of the trial Court towards adjudication of the case has vitiated the trial Court's judgment.

48. The learned Counsel for the respondent-CBI has submitted that the complainant had given an application dated 20.07.2004 addressed to GM, DLW, Varanasi for appointment of her daughter Khushboo Murad on compassionate ground, but no reply was received by her in this regard. She gave another letter dated 02.12.2006 addressed to GM, DLW and no information regarding this application was received. Thereafter, the complainant gave two more applications dated 30.05.2007 and 04.06.2008 for registration of her second daughter Roshni Murad for appointment in place of her elder daughter Khushboo Murad. In reference to her letter dated 04.06.2008, she received a reply dated 21.02.2009 from DLW office in which it was said that registration of her daughter could not be done as per the rules. The application dated 04.06.2008 of the complainant was rejected by the appellant. Thereafter she gave two more applications dated 09.04.2009 and 10.04.2009 for registration of her second daughter Roshni Murad, but no reply was received in respect of the aforesaid letters. Then she met the then CPO – the appellant B. K. Bihani, but he did not give a clear reply. After this, the appellant had called her through a messenger and had demanded bribe. The messenger gave the mobile number of the accused to complainant. Complainant talked to the appellant but no conversation regarding demand of money took place. The messenger contacted the complainant again and instructed her to talk the accused in clear terms and to offer bribe to him. The complainant again called the appellant through his phone number 9794861600 and demanded bribe from her.
49. The conversation regarding demand of bribe of amount Rs. 2,50,000/- was recorded by the complainant in her mobile phone. On 08.01.2010 she met with CBI team and the CD - Q1 brought by her was played before all, including the independent witnesses.
50. The complainant called the accused on his mobile phone at 06:15 put it on speaker mode and told the accused that she had brought the money and asked the appellant as to where should she meet him. The appellant told that he would inform her in half an hour. The complainant stated that this conversation was heard by all the persons and it was recorded in a CD - Q2. After some time, the accused called the complainant from landline phone No. 05422270102 at about 06:50

and told her to come alone with the money in 45 minutes at his bungalow. The said conversation was heard by all and recorded on CD - Q-3. The pre-trap memo was signed by all. The complainant stated that when she reached inside the bungalow of the accused, he had demanded the bribe money. The complainant proved the transcript of the conversations by her oral testimony.

51. The learned Counsel for the CBI has submitted that the complainant has proved the demand, acceptance and recovery of bribe money by the accused B K Bihani. If the work of the complainant was not pending with the accused or if he was not competent to do the work then a question arises that why he was entertaining a lady and even calling her to his official house in the night and that too all alone.
52. The learned Counsel for the respondent submitted that the accused tried to flee which shows the conduct of the accused relevant under section 8 of Indian Evidence Act.
53. The learned Counsel for the respondent also submitted that PW-4 stated that the file of appointment on compassionate grounds should have been presented to the General Manager and remark of accused was not as per direction of Railway board. PW-5, Nagendra Nath Pathak proved the procedure of appointment on compassionate ground and also proved D-14, file related to appointment on Compassionate ground of Khushbu Murad and also deposed about all the applications of the complainant and orders thereon. He further stated that there was 6 months' delay in making the noting on the file of the complainant. Further, according to the master circular, the period of five year (after death) could be relaxed by General Manager.
54. The learned Counsel for the respondent further submitted that the appellant had not forwarded the application of the complainant to the General Manager, although it was addressed to the GM and the appellant was sitting over the file. Although the appellant was not competent to deal with the case, he had called the complainant alone to his house whose official work was pending with him.
55. PW-6 had proved that the mobile number 9794861600 was being used by the appellant and this phone number was used to call the complainant for demand of bribe. PW-7, Tara Shankar SDE, Dept. of P&T, Varanasi confirmed his signature on Call record of phone

number 05422270102. According to this call record a call was made from above landline number 05422270102 to the mobile number of the complainant on 08.01.2010 at 06:53 PM which was of 2073 seconds.

- 56.** PW-8, Viplav Sharma, Inspector, CBI stated that on 08.01.2010, the conversation between the accused and the complainant in CD - Q1 was heard by all. He also stated that accused called the complainant over his mobile phone from his land line number at about 06:45 PM which was heard by all. The learned Counsel for the respondent submitted that the aforesaid evidences proved that a demand was made by accused. The conversation was recorded in a CD which was sent for voice examination to CFSL New Delhi. The Voice report confirmed voice in Q 1, Q 2, Q 3 and Q 7 matched with sample voice of appellant.
- 57.** As has already been held in the preceding paragraphs, the CDs Q 1, Q 2 and Q 3 were not accompanied by any certificate under Section 65 B and the CDs are not admissible in evidence. No certificate under Section 65 B has been in respect of the CD Q 7 and it is not admissible in evidence for this reason.
- 58.** So far as the submission regarding voice sample report is concerned, the certificate dated 20.08.2011 (Exhibit A-45) was issued by Sri. Amitosh Kumar, Senior Forensic Officer. Gr. II-cum-Assistant Chemical Examiner to the Government of India, Physics Division, Central Forensic Science Laboratory, Central Bureau of Investigation, New Delhi. The Officer has certified that “the voice marked exhibits Q-1 (I) (A), Q-2 (I) (A), Q-3 (I) (A), Q-7 (II) (A), Q-1 (I) (A) & Q-7 (III) (A) are the probable voice of the person (Shri Basant Kumar Bihani) whose specimen voice are marked as exhibits S1 (I) (A) & SA-1 (I) (A). He has not given a categorical finding that the voice samples belonged to the accused. Therefore, the accused cannot be punished on the basis of the expert’s opinion that the voice in question was the probable voice of the appellant as conviction can be based only on proof beyond reasonable doubt, and not on a mere probability.
- 59.** The prosecution has produced the complainant as PW2-Noor Fatima and in her Examination-in-chief she has stated that during the pre-trial proceedings, a CD - Q1 containing the earlier recorded conversation

was played which was heard by all present and it disclosed that the appellant had demanded the illegal gratification of Rs.2.5 Lakhs from her. This conversation was made on 04.01.2010 and it was recorded in the mobile phone of the complainant. It is mentioned in the pre-trap memorandum that the CD was produced by the complainant, which was heard by all present, whereas the complainant stated in her Cross-examination that she had not given the CD containing recording of conversation in her mobile phone during the pre-trap proceedings. No witness has stated that he had prepared the CD – Q1. The certificate under Section 65-B of the Evidence Act (Paper No. A-70, Exhibit A-33) regarding this CD has been prepared and produced by PW-13 on 31.05.2019, i.e. after about a decade. It is stated in the certificate that the CD containing a pre-recorded conversation was produced by the complainant Noor Fatima. PW-13 did not state that he had prepared the CD or that the CD was prepared in his presence. Nobody said that he had prepared the CD - Q1. Therefore, the certificate under Section 65-B issued by PW-13 regarding CD – Q1 becomes meaningless. In absence of evidence regarding maker of CD – Q 1, and the CD – Q1 having been filed without being accompanied by a certificate under Section 6 B, is not admissible in evidence.

60. The transcript of conversation recorded in CD Q-1 has been filed as Q-4. This conversation was held during a phone call made by the complainant to the appellant, wherein the complainant stated that an unknown person had met her as the messenger of the appellant and had given the appellant's number to her. The appellant stated that he had not sent any messenger and his number was a CUG number and it was known to the public. Secondly the appellant stated that the complainant's work could not be done from his level. Thirdly the complainant insisted that the appellant should get her work done and that she would serve the appellant, but the appellant did not make a specific demand of money for doing her work.
61. The transcript of the conversation recorded in CD Q-2 has been filed as Q-5 and in this conversation the appellant merely stated that he was busy and will talk later.

62. The transcript of the conversation recorded in CD Q-3 has been filed as Q-6 and in this conversation the appellant asked the complainant to come alone to his home.
63. The CD-Q3 contains a recording of a conversation running into 187 seconds whereas as per the Call Detail Records, the call ran into 2073 seconds, which indicates that the prosecution has not produced the entire conversation in evidence. The conversation allegedly happened telephonically, but the CBI has neither seized the mobile phone of the complainant nor that of the appellant so as to prove the said conversation.
64. There is no recording of the conversation held during the trap proceedings, when the appellant allegedly demanded and accepted bribe.
65. PW-2 stated In her Examination-in-chief that she had received a call on her mobile phone from the landline phone of the appellant and he had put her mobile phone on speaker mode and made everyone present there listen to the conversation, in which the appellant had asked her to come to him with the money within 45 minutes. The conversation happened telephonically, but the CBI has neither seized the mobile phone of the complainant nor has it proved that the landline number, from which a call was made to the complainant's mobile phone, belonged to the appellant.
66. PW-2 (the complainant) stated in her Examination-in-chief that the appellant took her inside the room, latched the room from inside, asked her to sit down and asked for the money, whereupon she took out the currency notes from a polythene bag and handed it over to the appellant. The appellant took the money and placed it on the table. This statement of PW-2 is not corroborated by any other evidence, as it was not heard by any other person and it was not recorded in the Digital Voice Recorder, whereas the other conversations between the complainant and the appellant were recorded. The CBI claimed that the Digital Voice Recorder which was working during the pre-trap proceedings and the post trap proceedings, had not functioned during the trap proceedings.
67. One of the independent witnesses accompanying the trap team, namely Vijay Kushwaha, was examined as PW 3. He stated in his

Examination-in-chief that initially it was agreed that the other independent witness Pradeep Srivastava will accompany the complainant as the shadow witness but as the appellant had asked the complainant to come alone, Pradeep Srivastava remained with the trap team. In his Cross examination, PW 3 stated that prior to reaching the house of the appellant, he had not heard the voice of the appellant, which statement was contradictory to the statement made by the complainant that the recording of conversation between the complainant and the appellant was played and everyone had heard that conversation. PW 3 further stated that the complainant had told that the appellant had called her alone, indicating that the alleged conversation between the complainant and the appellant had not been heard by the independent witness PW-3. PW-3 further stated in his cross examination that he did not remember that upon the complainant telling that the appellant had called her alone, whether any member of the trap team had asked her to tell it to the appellant that she is a woman and it was night time, therefore, she could not come alone. He even did not remember whether during the two telephonic conversations between the appellant and the complainant there was any reference to bribe.

68. PW-3 further stated that when the Trap Laying Officer Mahesh Singh got a missed call on his mobile phone, all persons went running inside the house of the appellant and the complainant told them that the appellant had demanded money. It is relevant to note that the complainant had stated in her statement that the appellant had latched the door from inside. When there is no statement that the latch was opened by the complainant or the appellant, how did all the other members of the trap team get inside the appellant's house, also remained unexplained, which also raises a doubt against the version of the complainant.
69. Further, the alleged independent witness PW-3 stated that on the instructions of the Trap Laying officer Mahesh Kumar Singh he had picked up the currency notes that were kept on the table, which shows that PW 3 was acting as a member of the trap team and a subordinate of the trap laying officer. The learned Counsel for the respondent has submitted that PW-3 was directed to make the recovery to prevent of

the possibility of the recovery being labeled as planted. This submission cannot be accepted as making the recovery was the function of the members of the trap laying team and the role of the independent witness was to witness the proceedings independently. When the independent witnesses started acting on the instructions of the trap laying officer, he lost his independent character. Moreover, in making the recovery, he acted beyond his authority. Therefore, it appears that PW-3 was acting under the instructions of the Trap Laying Officer as his subordinate member of the trap team and he was not witnessing the trap proceedings independently.

70. Another member of the trap team namely Viplav Sharma has been examined as PW-8 and he stated in his examination-in-chief that when the team members went inside the appellant's house, the complainant pointed towards the appellant and told that he had demanded Rs.2,50,000/- as bribe and had accepted Rs.50,000/- assuming the same to be Rs.2,50,000/-. In his cross examination, PW-8 stated that the members of the trap team did not witness any conversation regarding any demand or acceptance.
71. Another member of the trap team A. K. Sharma (PW-12) stated that the appellant had made a phone call from a landline number of his office to the mobile phone of the complainant and as per his statement, the team members had believed that the appellant was on the other side of the line as per the statement of the complainant herself. However, no evidence has been lead to connect the landline number 05422270102, from which the call was made to the mobile phone of the complainant, belonged to the appellant.
72. PW-12 further stated in his examination-in-chief that when the team members went inside the appellant's house, the complainant told that the appellant had demanded Rs.2,50,000/- as bribe and had accepted Rs.50,000/- assuming the same to be Rs.2,50,000/-. In his cross examination, PW-13 stated that the members of the trap team did not witness any conversation regarding any demand or acceptance.
73. The Trap Laying Officer Mahesh Singh has also made similar statements.
74. This indicates that except for the complainant herself, there is no other witness of the alleged demand of bribe made by the appellant. When

there are contradictions with respect to the statements made by the complainant in this regard as noted above, her statement becomes doubtful and cannot form the basis of conviction of the appellant.

75. Moreover, no reasonable person of ordinary prudence can accept that Rs.50,000/- can be arranged in five packets so as to make it appear Rs.2,50,000/- and any person or ordinary person, and at any rate, a person holding a Class I post in a Government Department, will accept Rs.50,000/- treating the same to be Rs.2,50,000/-. The story set up by the prosecution that they had arranged Rs.50,000/- in five packets so as to make the same appear to be Rs.2,50,000/- is inherently improbable.
76. In his statement recorded under Section 313 Cr.P.C. the appellant had categorically denied all the allegations leveled against him. A question was asked to the appellant regarding the letter dated 09.04.2009 submitted by the complainant for compassionate appointment of her daughter and it was put to the appellant that no reply was communicated to the complainant. In reply, the appellant stated that he had given a clear reply by making an endorsement on the letter. The appellant stated that the complainant's younger daughter was not entitled to be get compassionate appointment as per the Rules and this request had already been rejected by his predecessor officer. The appellant stated that the phone number 05422270102 was not of his office. He denied that he had sent any messenger to the complainant. He declined having made any conversation with the complainant. The appellant further stated that Noor Fatima had herself stated that she had not given any CD regarding any pre-trap conversation. The appellant also stated that he was caught in the big hall which was used as the drawing/dining room whereas the money was kept on a table in the visitor's room and he had not touched the money. However, Noor Fatima had shook hands with him. The appellant also stated that his fingers were washed in plain water and the color of the water did not change. The colored solution was prepared afterwards. The appellant further stated that the T.L.O. had concealed important primary evidence of the Digital Voice Recorded and he had committed an offence under Section 204 IPC. The appellant stated that CFSL New Delhi is an organization subordinate to the CBI. The appellant stated

that he had been falsely implicated because he had told that the complainant's younger daughter was not entitled to be given appointment on compassionate ground.

77. After examination of PW-15 – an official of mobile phone service provider company Airtel who had given evidence regarding the call detail records relating to the period 01.01.2010 to 08.10.2020, the appellant denied that he knew the holder of the other mobile phone number and he stated that the witness PW-15 was not competent to issue the certificate under Section 65 B of the Evidence Act.
78. The appellant had examined five defence witnesses – the appellant's wife Smt. Sangeeta Bihani was examined as DW-1 and amongst other things, she stated that on 13.01.2010, some CBI officials had come to her house along with two employees of DLW, one of whom was Mr. Sahay and the other was from Vigilance Department of DLW. They had demanded the Laptop computer of the appellant and they had deleted something from it. No question was put to her to contradict her on this point.
79. DW - 2 Atul Kumar was posted as a Bungalow Peon at the appellant's house. He stated that he was present in the house when the complaint had come there, Mrs. Bihani had asked him to offer the visitor some water and tea and when he had heard the appellant speaking in a loud voice that he did not do such things and he will not accept the thing.
80. DW-3 Dinesh Prasad Singh had retired from the post of Senior Personnel Officer from the Railway in the year 2014 and he had proved the signature of K. B. Sahay on Defence Document 1. He also stated that after about 8-9 months since the incident, the complainant had come to him and had requested to get her talk to the appellant. He had made a phone call to the appellant and had given the phone to the complainant, who had said on phone that her daughter should be appointed as a Section Engineer.
81. DW-4 Naveen Prakash Tiwari proved the signatures of Prem Nath Tiwari on paper no. C 71/2 when was a letter dated 31.03.2010 written by Prem Nath Tiwari to the appellant.
82. The appellant had examined himself as DW-5 and he stated that the complainant's letter dated 04.06.2008 was placed before him in January / February 2009 and he had taken a decision thereon and the

same decision had been taken by his predecessor officer. The S.P.O. had communicated the decision to the complainant. The complainant sent two more letters dated 09.04.2009 and 10.04.2009 and he had reiterated his decision by writing a note on the upper right corner of the letter, which shows that the appellant's decision was clear that the request was not in accordance with the law. The complainant met the appellant in his office some time towards the end of April 2009 and requested for appointment of her younger daughter and he told her that the younger daughter could not be appointed. The complainant then stated that her elder daughter would complete her B.Tech. course in an year and she be appointed as a Section Engineer. However, as per the relevant circular of Railway Board, on the date of attaining majority the complainant's elder daughter had passed class XII and the qualification of B.Tech acquired by her later in the year 2010 could not be taken into consideration and by that time, her case for claim of compassionate appoint would become time barred. The complainant had come to with the appellant on the occasion of new-year and she had told him that she had constructed a Shiv Temple, which had surprised the appellant and he had appreciated it. The complainant had stated that she would come to invite the appellant and his family on the occasion of a special pooja on Makar Sankranti. On the date of the trap, she had come to his house, shook hands with him and had said that she was passing by and she dropped in to invite him for the Makar Sankranti pooja. Thereafter she requested for appointment of her younger daughter and when the applicant stated that she could not be appointed, she stated that then her elder daughter be appointed as a Section Engineer, whereupon the appellant stated that the appointment can be made as per Rules only. The complainant offered a polythene bag held in her hand and said there were Rs.50,000/- in it and the appellant should get her daughter appointed as a Section Engineer. This was unexpected for the appellant and he said in a loud voice that he did not do such works and he would not do it. He went inside to call her wife so that she may turn her away. The appellant's wife was in the bathroom and after waiting for 1-2 minutes, he came back and while he was putting aside a stool kept in the way, the CBI team entered the room and caught him. He was

taken to the wash basin, plain water was filled in two glasses and his hands were washed, but nothing happened and he said in a loud voice that nothing had happened, but the team leader made him sit quietly in a corner under the gaze of a person for about 3 hours. He further stated that the laptop computer of CBI team has malfunctioned and they had demanded the appellant's laptop computer and had done some work on it.

83. The appellant had submitted several documentary evidences also, including a video file – Document No. 24 which was accidentally left by the CBI team in the appellant's laptop, which indicated that the CBI team was using two Digital Voice recorders. On 13.01.2010, the CBI persons had again gone to the appellant's house and they had deleted some files from the appellant's laptop computer. However, as they had come illegally, they left in a hurry and in the haste, they omitted to delete one file from the laptop computer. The appellant stated that the file, in which it was recorded that he had declined to accept money from the complainant, had been deleted by the CBI people. He further stated that the CBI team was using more than one Digital Voice Recorder during the trap proceedings and it is not possible that all of those had malfunctioned during the trap.
84. The appellant also stated that when during the cross examination of PW-8 Viplav Sharma, he had put a question regarding the visit to his home, he had got startled and had drunk water and the appellant had pointed out this demeanour of the witness to the notice of the court.
85. The appellant had further stated that the complainant was holding her mobile phone in her hand and she was also recording the incident and she did not give her mobile phone to the investigating officer. Thus three recording devices were removed from the scenario.
86. Although the trial court has given a brief narration of the statements of the defence witnesses, while arriving at a finding on the point of demand and acceptance of bribe, the trial court did not take into consideration and deal with the statement of any of the defence witnesses, which vitiates the finding of the trial court on this point.
87. In view of the aforesaid discussion, I come to the conclusion that the prosecution could not prove beyond reasonable doubt the demand of Rs.2,50,000/- made by the appellant as bribe and acceptance of

Rs.50,000/- by him treating the same to be Rs.2,50,000/- and the finding of trial court on this point is wrong and unsustainable.

88. In **Neeraj Dutta v. State (NCT of Delhi)**, (2023) 4 SCC 731, the following question had been referred for decision to a Constitution Bench of the Hon'ble Supreme Court: -

'The question whether in the absence of evidence of complainant/direct or primary evidence of demand of illegal gratification, is it not permissible to draw inferential deduction of culpability/guilt of a public servant under Section 7 and Section 13(1)(d) read with Section 13(2) of Prevention of Corruption Act, 1988 based on other evidence adduced by the prosecution.'

While answering the question, the Hon'ble Supreme Court summarised the law on the point as follows: -

- (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 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 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 in turn 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.*
- (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) 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."*

89. The Constitution Bench of the Hon'ble Supreme Court answered the question as follows: -

"In the absence of evidence of the complainant (direct/primary, oral/documentary evidence), it is permissible to draw an inferential deduction of culpability/guilt of a public servant under Section 7 and Section 13(1)(d) read with Section 13(2) of the Act based on other evidence adduced by the prosecution."

90. After the Constitution Bench had answered the question referred to it, the Hon'ble Supreme Court allowed the Appeal against conviction

and the judgment is reported as **Neeraj Dutta v. State (NCT of Delhi)**, 2023 SCC OnLine SC 280. In that case, the prosecution had alleged that the first demand was made by the appellant to the complainant in the morning of 17.04.2000 when he met her at her residence. There was no charge framed on the basis of this demand and there was no evidence about the first demand made in the house of the appellant as no one except the complainant was present there. According to the prosecution case, the second demand was made during the trap and PW-5 was the witness to the second demand made by the appellant on 17.04.2000, who stated that that appellant had asked the complainant to **give papers regarding his electricity meter and Rs. 10,000/- to her as she was in a hurry**. The Hon'ble Supreme Court held that *"This is not a case where a specific demand of gratification for providing electricity meter was made by the appellant to the complainant in the presence of the shadow witness."* And that *"Every demand made for payment of money is not a demand for gratification. It has to be something more than mere demand for money."*

91. In **B. Jayaraj versus State of A. P.**, (2014) 13 SCC 5, **Dashrath Singh Chauhan v. CBI**, (2019) 17 SCC 509 and **N. Vijaykumar versus State of Tamilnadu**, (2021) 3 SCC 687 also, the Hon'ble Supreme Court held that demand of illegal gratification is sine qua non to constitute the offence under Section 7 and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. Where only recovery of the tainted currency notes from the possession of the accused was proved and there was no proof of demand, the offence under Section 7 was not established. The above also will be conclusive insofar as the offence under Sections 13(1)(d)(i) and (ii) is concerned as in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established.
92. In **K. Shanthamma v. State of Telangana**, (2022) 4 SCC 574, PW-1, who was the only witness to the alleged demand and acceptance, stated that firstly, the demand was made of Rs 3000 by the appellant

on 24-2-2000. Thereafter, continuously for three days, she reiterated the demand when he visited the appellant's office. Lastly, the appellant made the demand on 29-2-2000 and 23-3-2000. In his cross-examination, he did not state that the appellant reiterated her demand at the time of trap. His version was that on his own, he told her that he had brought the amount. The Hon'ble Supreme Court held that the version of PW 1 in his examination-in-chief about the demand made by the appellant from time to time was an improvement. There was no other evidence of the alleged demand. Thus, the evidence of PW 1 about the demand for bribe by the appellant was not at all reliable and the demand made by the appellant was not proved conclusively. The Hon'ble Supreme Court held that this was a case where the demand of illegal gratification by the appellant was not proved by the prosecution. Thus, the demand which is sine qua non for establishing the offence under Section 7 was not established.

93. The law laid down by the Hon'ble Supreme Court in the aforesaid cases fully supports the case of the appellant. The only evidence of the demand and acceptance is the statement of the complainant herself and there are contradictions in her statement, which have been noticed above. Therefore, I am of the view that the demand for and acceptance of bribe amount by the appellant, is not proved beyond reasonable doubt.
94. In **N. Vijaykumar** (Supra), the Hon'ble Supreme Court has cautioned that *"Before recording conviction under the provisions of the Prevention of Corruption Act, the courts have to take utmost care in scanning the evidence. Once conviction is recorded under the provisions of the Prevention of Corruption Act, it casts a social stigma on the person in the society apart from serious consequences on the service rendered."*
95. Therefore, I am of the considered view that the prosecution has failed to prove the demand and acceptance of bribe by the appellant and the finding to this effect recorded by the trial court is vitiated and is liable to be set aside.
96. In view of the foregoing discussion, the appeal is allowed. The judgment and order dated 31.03.2023 passed by Sri. Vijesh Kumar, the learned Special Judge (Prevention of Corruption Act), CBI Court

No. 3, Lucknow in Criminal Case No. 02 of 2011 titled State versus Basant Kumar Bihani, arising out of RC No. 0062010A002 under Sections 7 and 13 (2) read with 13 (1) (d), Prevention of Corruption Act, 1988 (hereinafter referred to as 'the Act'), Police Station CBI/ACB, Lucknow, is hereby **set aside**. The appellant is acquitted of all the charges levelled against him. However, there will be no order as to costs.

(Subhash Vidyarthi, J.)

Order Date : 16.01.2024

Ram.