IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL No.817 OF 2011**

**JAYSING NARAYAN BIDGAR**
Age about 51 yrs, Occ.Service
R/o Flat No.2, Bombay Sappers,
Colony Simran Classic Apartments,
Vadgaon Sheri, Pune-411014 .. **APPELLANT**

*Versus*

**THE STATE OF MAHARASHTRA .. RESPONDENT**

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Mr.S.R.Chitnis, Sr. Advocate with Mr.V.V.Pai, for the appellant.

Mr.Deepak Thakre, APP for the Respondent State.

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**CORAM : ABHAY M. THIPSAY, J.**

**DATED : 11th MARCH 2015**

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**JUDGMENT :-**

1 This Appeal is directed against the judgment and order dated 2nd July 2011 delivered by the Special Judge, Pune in Special case No.26 of 2009, convicting the appellant who was the sole accused in the said case, of offences punishable under section 7 and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (for short 'P.C. Act')

Corrected pursuant to the order dated 24th April 2015 on the preacipe for speaking to minutes.

2 By the said judgment and order, the learned Special Judge sentenced the appellant to suffer RI for six months with respect to the offence punishable under section 7 of the P.C. Act, and to suffer R.I for 1(one) year, and to pay a fine of Rs.500/- with respect to the offence punishable under section 13(2) of the P.C. Act. The learned Judge directed that the substantive sentences would run concurrently.

3 The prosecution case can be best stated from the 'brief facts of the case' appearing in Column No.16 of the printed prescribed proforma of the police report/charge-sheet.

Digambar Bajirao Borade is a person working as a plumber in Tata Institute of Fundamental Research. He resides at Navy Nagar, Colaba, Mumbai. About two years before, he had purchased a shop admeasuring about 300 sq.ft situate at Maruti Mandir Chowk, Omkar Co-operative Housing Society. This shop is in the name of Borade's wife Pramila Borade. Borade is doing the business of footwear in the said shop, and has named the same as 'Mumbai Style Footwear'. There are totally five shops in the said co-operative society, and there are about 10-12 residential tenements.

That the owners of the residential tenements have been made members of the said housing society, but no shop owner has been made a member. Borade had requested the Chairman of the said housing society on a number of occasions that his wife also be made a member of the society, but the society had not accepted Borade's wife as a member. Borade, therefore, made an application to the Assistant Registrar of Co-operative Societies, Pune on behalf of his wife, but though a period of two years elapsed, since the giving of the said application, the Society did not admit Borade's wife as a member of the Society. Borade had purchased the shop in the name of his wife from one Kothari, and after it had been purchased, he had paid a transfer fee of Rs.5,000/- to the Chairman of the said Society. However, while giving the receipt, the amount was shown as voluntary donation for the building fund. Borade was informed that in case of sale of premises by any member, the Society used to give such type of receipts only.

A few days after this incident, Borade had approached the Chairman of the said Society for obtaining a water connection, but was informed by the Chairman that since shop owners had not been admitted as members, they had no right to seek any assistance from the Society for water connection. Borade then asked the Chairman as to why in that case, an amount of Rs.5,000/- had been taken from him for which the Chairman could not give any satisfactory reply.

Borade went to the office of the Assistant Registrar of Co-operative Societies after this incident, gave a written complaint and met Assistant Registrar - Shri Katke. This was on 4th December 2008. Katke told him that he would entrust Borade's work to the Head Clerk Shri Bidgar (appellant). Borade then contacted Bidgar and inquired about his work when the appellant told him that Borade would have to pay Rs.500/- to him, and that otherwise, the appellant would not make any inquiry into Borade's application/complaint. Borade asked the appellant as to whether he would get a receipt in respect of the said amount, whereupon the appellant answered in negative. Borade then realized that the appellant was demanding illegal gratification from him. Borade did not intend to pay any illegal gratification, and therefore, told the appellant that he would not be able to give money to him. The appellant then said that he would not make any inquiry into the application of Borade.

4 Borade did not want to pay the amount, but was convinced that unless the money would be paid, the appellant would not take any further action on his application, and having left with no other alternative, he agreed to pay an amount of Rs.500/- to the appellant. He, however, lodged a complaint against the appellant with the Anti Corruption Bureau, Pune on 6th December 2008. 7th December 2008 being a Sunday, a trap was arranged on 8th December 2008.

Accordingly, when the appellant demanded an amount of Rs.500/- as and by way of illegal gratification from Borade in the presence of a panch witness, and when he accepted the same in the office of the Assistant Registrar Co-operative Societies, he was apprehended red-handed. Thus, the appellant (hereinafter referred to as 'the accused') had committed offences punishable under section 7 and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988.

5 In order to prove its case, the prosecution examined four witnesses during the trial. The first witness Kishore Toshniwar who was serving as the Divisional Joint Registrar, Co-operative Societies Pune Division, Pune, at the material time, is the person who had accorded sanction to prosecute the accused, as required under section 19 of the P.C. Act. The second witness is Borade himself. The third witness Vijay Kharat is a panch in respect of the pre-trap and post-trap panchnama. The fourth witness Padmakar Dhanvat, Dy. Superintendent of Police, is the Investigating Officer.

6 I have heard Mr.S.R. Chitnis, the learned Senior Advocate for the accused. I have heard Mr.Deepak Thakre, the learned APP for the State. With the assistance of the learned counsel, I have gone through the impugned judgment and the entire evidence that was recorded during the trial.

7 Mr.Chitnis, the learned Senior Advocate for the accused submitted that there was absolutely no evidence to hold the accused guilty. He submitted that there was no satisfactory evidence of any demand for illegal gratification, nor was there any satisfactory evidence of the acceptance of any amount by the accused. He submitted that the testimony of Borade, the *de facto* complainant, suffers from a number of infirmities, and is not worth relying upon.

8 Among other things, it is submitted that the accused was merely a head clerk in the office of the Registrar, Co-operative Societies, and was not in a position to require the office bearers of the said Society to admit the wife of Borade as a member of the Society. It is also submitted that the dispute between Borade and the office bearers of the said Society was apparently pending for quite some time, and Borade was aggrieved by the fact that nothing was being done by the office of the Dy. Registrar, Co-operative Societies in the matter. The suggestion is that it is because of his grievance and his perception that no proper assistance was being given to him by the office of the Dy. Registrar Co-operative Societies, he had a grudge against the working of the said department and therefore, a motive to implicate somebody from the said office, falsely.

9 The first point needing determination is whether there

was satisfactory evidence of the demand of illegal gratification by the accused. It is because unless the evidence of initial demand which would be the foundation of the 'trap cases' is satisfactory, the entire prosecution case would be seriously affected.

10 When the evidence of Borade is examined in this context, it is noticed that he had given a complaint to the Dy. Registrar, Co-operative Societies on 4th December 2008, and had met the Dy. Registrar Shri Katke. According to Borade, as directed by Katke, he met the accused on the same day, and when he inquired with the accused about his work, the accused demanded an amount of Rs.500/-. For this demand, obviously, no corroboration from any other witness can be expected. Borade, thereafter reported the matter to the Anti Corruption Bureau. It was on 6th December 2008. The evidence of Padmakar Dhanvat (PW 4) shows that after recording the complaint of Borade, a trap was arranged, and before the same was arranged, no verification of the alleged demand of illegal gratification was done. Of course, being aware of the necessity of the such verification, it was sought to be done *before* the illegal gratification would be given, and for that purpose, a panch witness was to accompany Borade, listen to the conversation that would take place, and keep a watch on the happenings. Accordingly, panch Vijay Kharat was sent with Borade. Borade was also provided with a tape-recorder before meeting the accused. A currency note of Rs.500/- to which *Anthracin* powder was applied, was given

to Borade.

11 Borade and the panch Vijay Kharat went to the office of the accused. The accused is supposed to have repeated his demand of Rs.500/- in the presence of the panch Vijay Kharat. <u>According to Borade and Kharat, the conversation that took place between Borade and accused, was recorded.</u>

12 The evidence of Borade with respect to the demand of illegal gratification by the accused, and the evidence of panch Vijay Kharat (PW 3), in that regard, is not consistent.

13 According to Borade, the accused demanded money from him, and there was negotiation between him and the accused as to when the accused would be issuing notices. He does not state that the amount of Rs.500/- was quoted by the accused, on this occasion. Vijay Kharat, however, stated that Borade had asked the accused about his application, and that the accused told him that he would charge fees for that work, but that the complainant would not get any receipt for the payment. According to Vijay Kharat, Borade then told the accused that he had no money at that time, and it is thereafter that the accused told Borade that for inquiry into his application, Rs.500/- would be required. Thus, the

evidence of Vijay Kharat suggests that a reference to the amount Rs.500/- came *after* the demand had already been made by the accused, and after the accused had told that Borade would not get a receipt for the payment, etc. The amount of Rs.500/- had already been demanded by the accused, and it is only thereafter Borade had approached the Anti Corruption Bureau. A tainted currency note of Rs.500/- had already been with Borade, and there was no occasion for Borade to negotiate or fix the amount of bribe on 8th December 2008, when Borade had gone to the accused along with panch Vijay Kharat.

14 In the cross-examination of Borade, it has been revealed that the place where the accused sits in the office, was not a secluded place. The table of the accused was in front of the entrance on the side of the balcony, and there were about 6 to 7 persons in the office of the accused. The evidence of Vijay Kharat also shows that when the alleged discussion between Borade and the accused took place, about 4-5 staff members were sitting around the table of the accused. His evidence further shows that there were other visitors also in the office. Apart from the fact that in a place surrounded by other employees and visitors, the likelihood of the accused having demanded and accepted the bribe, is less, that, none of the other persons in the office should be examined as a witness, is also rather curious.

15 However, these are not the crucial aspects in assessing the truth of the version of Borade, and that of the prosecution, but what is crucial is non-production of the recorded conversation in spite of a claim that such conversation which indicated a demand of illegal gratification by Borade, was available. Though Borade had been provided with a tape-recorder, and though he claims to have tape-recorded the conversation that took place between him and the accused, the recorded conversation was not played at all before the Court during the trial. When the recording of the conversation was specifically done so as to collect evidence of the demand of illegal gratification, that it should not be played before the Court to convince the Court about the truth of the evidence regarding demand, is surprising. Interestingly, Borade has avoided stating categorically as to what was the talk that took place between him and the accused.

16 What is further shocking is that after Borade had stated in his examination-in-chief that 'he did not recollect the exact talk between him and the accused', instead of refreshing his memory with the permission of the Court by playing over the recorded conversation to him, an adjournment was sought on the ground that 'the witness wanted time for *preparation*, and was granted. The notes of evidence of Borade read as

under :-

> "I do not recollect the exact talk between me and the accused.
> (The witness wants time for preparation. Hence, chief deferred)
>
> R.O.A.C.
> Signature
> (Name)
> Special Judge (Under the P.C.Act)

(Emphasis supplied)

17 It is surprising that the witness should want time for 'preparation', but that such a plea should appeal to the Court, is shocking. What *preparation* a witness has to do before giving evidence, did not arise in the mind of the learned Special Judge before granting an adjournment on this ground. The concept of '*preparation by a witness for giving evidence*' is a shocking one, and obviously, such '*preparation*' would mean *getting tutored as to 'what ought to be said by him*'. Anyway, after the adjournment was granted, and Borade came for further examination-in-chief, obviously after having done 'the preparation' he did not give the details of the talk between him and the accused. Since he was stuck up at that stage, it was expected that after having done the 'preparation', he would be questioned about the talk, and would state about it. However, in the further examination-in-chief, Borade straight away spoke about what he did after entering the office room. Borade claimed that he switched on the tape-recorder and initiated the talk. It is worth

reproducing the evidence of Borade resumed after taking an adjournment for 'preparation'.

> While entering the room, I switched on the tape recorder and initiated the talk regarding my work. I asked the accused when he was to issue the notice. The accused told me that he will issue notice on the next day

Thus, there has been no demand by the accused on that day till this time.

Borade further states that :

> 'While talking with the accused, he demanded money by *gesture*.

18 Thus, according to Borade, there was no verbal demand made by the accused. This has to be viewed in the context of the fact that tape-recorded conversation has been held back by the prosecution. Interestingly, the case is that the verification of the demand was made by the Investigating Officer after hearing the tape-recorded conversation, but according to Borade, the demand was made by gesture, and as such, could not have been reflected in the tape-recorded conversation. Moreover, Vijay Kharat also does not speak of any demand made by the accused *by gestures*, but speaks of a demand made by words which, according to him, were recorded. The fact that the tape-recorded conversation has not at all been produced before the Court to corroborate the evidence given by the witnesses about the demand of illegal gratification by the accused, *though the recording was done*

*specifically for collection of evidence,* when viewed in the light of the discrepancies in the evidence of the witnesses in that regard, constitutes a serious weakness in the prosecution case, which, by itself, would be fatal.

19 However, even that is not the most crucial aspect of the matter. In the examination-in-chief, Borade stated that after the accused had demanded money by gesture, he had asked the accused as to when he would be giving the order, and then, the accused had told him that he had no power to give the order. It is thereafter that Borade took out tainted money from his shirt pocket, and gave it to the accused who accepted it by right hand and passed it to his left hand and then kept the same in the left side pant pocket.

20 In the cross-examination, however, it is revealed that when the accused demanded money, Borade told him that he had not that much money, and pretended to go out for withdrawing money from the ATM Center. The evidence of Vijay Kharat also shows that when the demand was made by the accused, Borade told him that he had no money at that time. Vijay Kharat also states that Borade had inquired about ATM Center, and when the accused told him that ATM Center of Union Bank was available next to his office, Borade, under the pretext of withdrawing money from ATM Center, went out. The same is the version of the Investigating Officer

Padmakar Dhanvat PW no.4 also.

21 According to Dhanvat, after Borade and the panch Vijay Kharat had gone inside the office room of the accused, and after Dhanvat and other members of the raiding party had been waiting outside, the complainant returned after about 10 minutes, and informed Borade that he had told the accused that he was to take money from ATM Center for giving to the accused.

22 Thus, the prosecution case is, clearly, that when the amount was demanded by the accused on 8th December 2008, Borade said that he did not have money, and in fact, went out on the pretext of withdrawing money from the ATM Center. This is indeed absurd because Borade had already been provided with a tainted currency note with instructions to give it to the accused as soon as the accused would make a demand for the same. Why in spite of having the tainted note with him, Borade did not give it to the accused, and instead told the accused that he did not have money, is indeed inexplicable.

23 The learned counsel for the accused vehemently contended that this itself shows that there was no demand of any illegal gratification by the accused. According to the learned counsel, the fact of the complainant's going out

without giving the tainted money to the accused only indicates that the accused did not make any demand at all, and that, because of this, Borade was unable to understand as to what should be done. According to the learned counsel, since there was no demand, Borade did not know what to do and came out to consult the Investigating Officer, whereafter it was decided to foist the tainted money upon the accused. Indeed, not only such an inference which is absolutely logical can reasonably be drawn, but it is not easy to think of a satisfactory refutation to the contention put forth, on the basis of the evidence that has been adduced before the court.

24 In this background, the other aspects of the matter, as reflected from the prosecution case itself, and the evidence adduced, be examined.

25 Admittedly, there was a dispute between the office bearers of the society and Borade, which was pending since quite some time. Borade had sought assistance from the office of the Registrar, Co-operative Societies, to have his wife made a member of the Society, and was unhappy that nothing was being done by the said office. Apparently, Borade was expecting an action under section 23(1) of the Maharashtra Co-operative Societies Act from the Assistant Registrar and/or Dy. Registrar in the matter of his grievance. Since the matter was pending with the Assistant Registrar and/or Dy.Registrar

for quite some time, and though the accused who was a mere head clerk or office Superintendent in the said office, could not have taken the required action himself from the point of view of Borade, it was the entire office that was to be blamed for the inaction. The possibility of Borade being annoyed and displeased with the entire working style of the said office and entertaining a belief that his work was deliberately not being done, is apparent from the way in which the case has been put forth by him. In such a situation, it was quite possible for Borade to have had a grudge against the Officers and staff working in the said office, and the possibility of such grudge resulting into a false claim of alleged demand of illegal gratification, and getting somebody from that office trapped 'for teaching a lesson to all of them', cannot be ruled out.

26 The following factors :

(i) That, Borade did not state what was the conversation between him and the accused on 8th December 2008 and did not state categorically about the demand;

(ii) That, the tape-recorded conversation was not at all produced before the Court during the trial, and no reason for its non-production was given;

(iii)That, Borade said that 'he did not recollect the exact talk between him and the accused' and sought an adjournment for '***preparation***"; and that, after coming *prepared,* he gave up the version of a demand of money made verbally by the accused, but introduced the theory of *demand by gesture;*

(iv)That, though in view of the version of Borade about the demand of money being *by gesture*, the recorded conversation, even if produced, would not have reflected such demand, *the Investigating Officer claims that it was* '*revealed to him from the conversation*' that there was a demand of money by the accused;

(iii)That, <u>Borade though was having the tainted note with him, which was specifically meant for giving to the accused on demand, and though he had been categorically instructed to do so, did not actually give the note to the accused when he allegedly demanded the money; and on the contrary, told the accused that he had no money, and that he would go out and withdraw money from ATM Center;</u>

(iii)<u>all, collectively, point out not only that there certainly is a reasonable doubt about the truth of the prosecution version, but go a step further and indicate that the prosecution case,</u>

as put forth, is quite likely to be false. It may be observed that some of the factors, singly and by themselves, are sufficient to create a reasonable doubt about the guilt of the accused.

27 The judgment of conviction as recorded by the learned Special Judge and the findings arrived at by him, are patently incorrect, contrary to law, and rather perverse. The approach of the learned Special judge was visibly biased inasmuch as had it not been so, he would not have given time to a witness for 'preparation' when his examination-in-chief was at a crucial stage. That the learned Judge did not find anything wrong in the witness asking time for preparation and obliged the witness by giving such time, indicates that there is something seriously wrong about the notions of the learned Judge about his role in the administration of justice. The learned Judge did not address himself to the question as to ***why*** when the accused had tainted money with him, specially for giving it to the accused, would not give the same to the accused when the accused allegedly demanded the same, and instead would state that he did not have money. The learned Judge did not understand the significance of this circumstance, which by itself, was sufficient to discard the prosecution case. The learned Judge also did not realise the significance of the fact that the recorded conversation was held back, and a story of 'demand by gesture' was introduced.

He did not consider whether it could be because of the fact that the recorded conversation did not reveal any demand. The learned Judge did not realise, that though the demand was 'by gesture', the Investigating Officer claimed to have learnt about it on having *heard* the recorded conversation.

28 This was a case where the charges against the accused, were not at all proved. The order of conviction of the accused, as recorded by the trial Judge, is bad and contrary to law. The same, therefore, needs to be interfered with.

29 The Appeal is allowed.

30 The judgment of conviction of the appellant as recorded by the Special Judge, and the sentences imposed upon the appellant, are set aside.

31 The Appellant stands acquitted.

32 His bail bonds are discharged.

33 Fine, if paid, be refunded to him.

**(ABHAY M.THIPSAY, J)**

Corrected pursuant to the order dated 24th April 2015 on the preacipe for speaking to minutes.