

IN THE HIGH COURT OF KERALA AT ERNAKULAM

[C.R.]

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 6TH DAY OF FEBRUARY 2015/17TH MAGHA, 1936

CRL.A.No. 24 of 2001 (C)

AGAINST THE JUDGMENT IN CC 29/1999 of ENQUIRY COMMR.& SPL.JUDGE,
THRISSUR, DATED 08-01-2001

APPELLANT(S):

GEORGE VARGHESE, FORMER ASSISTANT,
ENGINEER, N.H. (ADB) SECTION,
EDAPPALLY.

BY ADVS.SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENT(S):

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. K.K. RAJEEV.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27.11.2014 AND THE
COURT ON 06.02.2015 DELIVERED THE FOLLOWING:

SS

[C.R.]

K. RAMAKRISHNAN, J.

.....
Crl. A. No. 24 of 2001
.....

Dated this the 6th day of February, 2015

J U D G M E N T

Accused in C.C.29/1999 on the file of the Enquiry Commissioner and Special Judge, Thrissur, is the revision petitioner herein. The appellant was charge-sheeted by the Deputy Superintendent of Police, VACB, Ernakulam, in VC-9/97 of VACB, Ernakulam, under Section 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act (hereinafter called the P.C. Act).

2. The case of the prosecution in nut shell was that, while the appellant was working as Assistant Engineer, NH ADB Section I/II/II, Edappally, during 1997 abused his official position and demanded ₹2,000/- as illegal gratification from PW2 and accepted ₹200/- earlier and thereafter reiterated the demand for the balance amount of ₹1,800/- on 29.03.1997 at 3.00 p.m., from his office at

Edappally and thereafter fixed the amount as ₹1,000/- and in furtherance of that demand accepted ₹800/- from PW2 on 31.03.1997 at 10.30 a.m., / 10.50 a.m., from his office at Edappally, as a motive or reward for showing a favour and rendering his service in the official function and as such he had committed the offence punishable under Section 7 and 13(1)(d) read with Section 13(2) of the P.C. Act. After investigation, final report was filed before the Enquiry Commissioner and Special Judge, Thrissur and the learned Special Judge had taken cognisance of the case as C.C.No.29/1999.

3. When the appellant appeared before the court below, after hearing both sides, charge under Section 7 and 13(1)(d) read with Section 13(2) of the P.C. Act was framed and the same was read over and explained to him and he pleaded not guilty. Since there was some error crept in stating the ingredients of Section 13(1)(d) read with Section 13(2) of the P.C. Act in the original charge,

that alone was amended later and after amendment, the amended change was read over and explained to him again and he pleaded not guilty. In order to prove the case of the prosecution, PWs 1 to 9 were examined and Exts.P1 to P18 and Mos 1 to 13 were marked on their side. After closure of the prosecution evidence, the appellant was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that he had not committed any offence and he had not made any demand and he had only asked for the restoration charges payable by PW2 for the purpose of ratifying the illegal act committed by him by filling the earth to connect his property with the national high way as required under law and as such he had not committed any offence. In order to prove his case, DW1 was examined and Exts.D1, contradiction of PW3 in his 161 statement, D2 file and D2(a) and D2(b), D3, D3(a) and D3(b) through PW6 were marked

on the side of the defence. After considering the evidence on record, the court below found the appellant guilty under Section 7 and 13(1)(d) read with Section 13(2) for the P.C. Act and convicted him there under and sentenced him to undergo rigorous imprisonment for three years and also to pay a fine of ₹25,000/-, in default to undergo simple imprisonment for one year under Section 7 of the P.C Act and further sentenced him to undergo rigorous imprisonment for four years under Section 13(1)(d) read with Section 13(2) of the P.C. Act and directed the sentences to run concurrently. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

4. Heard the counsel for the appellant and the learned Public Prosecutor.

5. The counsel for the revision petitioner submitted that, the evidence adduced on the side of the prosecution is not sufficient to prove either the demand or

acceptance of the amount as claimed by the prosecution. Mere possession of the amount alone is not sufficient to attract the offence under Section 7 and Section 13(1)(d) read with Section 13(2) of the Act. It must be proved by the prosecution that, the amount demanded is the amount other than the legal remuneration which he is entitled to receive and which the party is liable to pay under law. Further the evidence of PW2 is contrary to what he has stated in Ext.P1, the first information statement regarding the incident. His case was that the appellant demanded ₹2,000/- and when he had expressed his inability to pay so much amount, it was reduced to ₹1,000/- and thereafter on a subsequent day ₹200/- was obtained from him and thereafter demanded for the balance amount of ₹800/- and since he found that, he was not legally liable to pay the amount, he made the complaint. But when he was examined before the court, he had a different case. His case was that, the amount was reduced to ₹1,000/- when he paid ₹200/- to him, after fixing

the amount of ₹2,000/-. Further, there are contradictions in the evidence of PW2 regarding the period at which the amount of ₹200/- was paid. Further Ext.D2 file in respect of this case and D2(a), D2(b) documents and D3 series of proceedings in another case will go to show that, he had only demanded the restoration charges and on calculation, it will come to ₹786/- and he told only approximately that ₹800/- will be required and he brought that amount along with trap party and it was seized from his possession. Further the evidence of PW6 could not be believed as Ext.D3 series will go to show that, Assistant Engineer was authorised to collect the amount for restoration charges, though the sanction and proceedings will have to be issued by a Chief Engineer and Executive Engineer respectively in such cases. But he is now trying to avoid the same stating that what is stated in Ext.D3 series as Assistant Engineer was a mistake for Assistant Executive Engineer, so as to suit the case of the prosecution.

6. He has also submitted that there is a presumption under the Act, if demand and receipt of the amount are proved by the prosecution, that it was intended for illegal gratification unless it is explained by the accused. The appellant did not give any explanation at the time of seizure alone is not sufficient to come to the conclusion that it was an illegal gratification that has been obtained by him and the subsequent explanation given by him at the time of 313 examination and the evidence adduced on the side of the appellant to prove this fact has to be taken into consideration by the court below to find out as to whether the explanation given by the appellant is plausible and probable and the appellant need not prove his case beyond reasonable doubt and he need only to prove his case by preponderance of possibility. The provisions of the Land Conservancy Act has been wrongly understood by the court below and as per the notification issued, Assistant Engineers of the NH have been authorised to initiate

proceedings under the Land Conservancy Act. So under the circumstances, the court below was not justified in convicting the appellant for the offence alleged and he had relied on the decisions reported in **(2002(10) SCC 371) Punjabrao v. State of Maharashtra** and **(1997(10) SCC 600) Mohmoodkhan Mahboobkhan Pathan v. State of Maharashtra** in support of his case.

7. On the other hand, the learned Public Prosecutor submitted that the evidence adduced on the side of the prosecution proved beyond reasonable doubt that the appellant had made the demand and received the amount. Further, there is nothing to disbelieve the evidence of PW2 on this aspect. Ext.D2 series was prepared by the appellant as a defence when he made the demand so as to escape from the consequences of his demand and the evidence of PW6 will go to show that no such paper was received by him, which it was expected to be reached him in the due course. So that shows that, the appellant had prepared

certain documents so as to cover up his act. Further the evidence of DW1 will go to show that he made the demand, it was at that time the amount was paid, but he did not know as to what was spoken between them. His case was that, he was taken to some other place from his seat and it is thereafter he came back. The appellant had no case as stated by DW1, when he was examined under Section 313 of the Code of Criminal Procedure or in the statement filed by him under Section 313(5) of the Code of Criminal Procedure. So under the circumstances, court below was perfectly justified in convicting the appellant for the offences alleged and no interference is called for.

8. The case of the prosecution as emerged from the prosecution witnesses was that, PW2 was having property on the side of the national highway and since his property has come to lower level when the national highway was established, in order to reach the national highway, he had made a road from his property up to the national

highway by filling earth during March 1997. After 20 days of such construction, the appellant came and found the same and came to his house and asked him whether he had obtained permission from the department for construction of the same and he told that he had not obtained any permission and he asked him to come to his office with ₹2,000/- and he would get it done. Subsequently, PW2 met him from Ponnammveli and at that time he told him to come to his office at Ernakulam with that amount and he went there, he told that he would be at Ponnammveli and accordingly he went to Ponnammveli and he asked money and he told that he was not able to pay so much amount. So it was reduced to ₹1,000/- and wanted money on that date itself and he gave ₹200/- and he wanted him to come to his office with the balance amount of ₹800/-. On 29.03.1997 at 3.00 p.m, when PW2 went to the office, he was made to execute Ext.P3 agreement on a stamp paper along with Ext.P3(a) plan to be submitted. Since he was not interested

in payment of the amount and later it was revealed that no amount need be paid, he went to PW9, the Dy.S.P. VACB, Ernakulam, and gave Ext.P2 statement. Thereafter, PW9 gave a letter to the District Collector and as per the directions of the District Collector and Project Officer, PW3 and another had come to the office of PW9 Dy.S.P. and PW2 also came there along with ₹800/- for the purpose of using the same for trapping the appellant and that was marked as MO1 series, in which he had put an identifying mark "Z". Thereafter he had made demonstration as to how the trap would be conducted and appraised the decoy witnesses and PW2 about the procedure and prepared Ext.P4 mahazar showing all these details. He had also told PW2 that, after payment of the amount, he had to give signal. Thereafter, he along with the trap party came to the office of the appellant and found the appellant sitting in the office along with DW1 and another clerk attached to his office. PW1 stood some distance away and PWs 9 and other police

officials and other decoy witness stood some distance away from there from where they could see PW2 giving signal. Accordingly PW2 went inside the office and the appellant asked him whether he had come with the amount and he took MO1 series in which Phenolphthalein powder was applied from his pant pocket and gave the same to the appellant which he received and put in his pant pocket. Thereafter he came out side and gave signal as instructed. Accordingly PW9 and others came inside and PW2 showed the appellant and PW9 introduced himself and asked PW1 to dip his hands/ fingers in the lime water solution and that did not turn pink and he conducted body search of PW1 and others and satisfied that there were no incriminating articles with them. Thereafter he asked the appellant to dip his hands in the solution and both his hands became pink and sample was collected from the solution, sealed and labeled which were marked as Mos 3 and 4. Thereafter the appellant took MO1 series currency from his pant pocket

and also another ₹250/-. The MO1 series notes were dipped in the solution and it turned pink and sample was taken from that solution, sealed and labeled, which was marked as MO5. When the amount of ₹250/- collected from the pocket of the appellant was tested as above, it did not turn pink and the sample of that solution was taken, sealed and labeled, which was marked as MO7. The Pants/ MO9 was taken and that was tested in the lime water and the portion where the notes were found turned pink and the sample of the solution was taken and labeled and that was marked as MO8. MO13 series were ₹ 250/- taken from his pocket. Thereafter, all these articles were seized as per Ext.P5 mahazar in the presence of witnesses after describing the procedure of trapping conducted there. Thereafter they arrested the appellant and came to the office of DW9. Thereafter he conducted further investigation in this case. MO12 shirt of the appellant was also seized. Ext.P13 tour diary, Ext.D2 files and Ext.P6 Photostat copy of the order

appointing the appellant and Ext.P6(a) manuscript copy of the order were seized as per Ext.P7 mahasar. The order of the Chief Engineer, PWD (Administration), and Ext.P9 register were seized as per Ext.P11 mahazar. Ext.P13 is the T.A. bill of the appellant during the relevant period. Ext.P16 to P18 mahazars were prepared for seizure of certain documents. As per the request of the investigating officer, PW7 prepared Ext.P14 sketch plan of the house of the PW2 and PW8 Village Officer prepared Ext.P15 plan of the office room of the appellant from where the detection of the crime was made. He completed the investigation and submitted final report.

9. Section 7, 13 and 20 of the Prevention of Corruption Act reads as follows:

7. Public Servant taking gratification other than legal remuneration in respect of an official act.

Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions,

favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of Section 2 or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than [three years] but which may extend to [several years] and shall also be liable to fine.

Explanations.- (a) "Expecting to be a public servant". If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.

(b) "Gratification". The word "gratification" is not restricted to pecuniary gratification or to gratifications estimatable in money.

(c) "Legal remuneration". The words "legal remuneration" are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government or the organisation, which he serves, to accept.

(d) "A motive or reward for doing". A person who receives a gratification as a motive or reward for doing what he does not intend to or not in a position to do, or has not done, comes within this expression.

(e) Where a public servant induces a person erroneously to believe that his influence with the Government has obtained a title for that person and thus induces that person to give the public servant, money or any other gratification as a reward for this service, the public servant has committed an offence under this section.

13. Criminal misconduct by a public servant.-

(1) A public servant is said to commit the offence of criminal misconduct.-

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself

or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in Section 7; or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned; or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or

(d) if he, -

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

(e) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

20. Presumption where public servant accepts

gratification other than legal remuneration.- (1) Where, in any trial of an offence punishable under Section 7 or section 11 or clause (a) or clause (b) of Sub-section (1) of Section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(2) Where in any trial of an offence punishable under Section 12 or under clause (b) of section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7, or as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-sections (1) and (2), the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no interference of corruption may fairly be drawn.

10. Before going to the facts of the case, the precedents on this aspect can be considered.

In the decision reported in (AIR 1964 (SC) 575)

Dhanvantrai Balwantrai Desai v. State of

Maharashtra, the Hon'ble Supreme Court has held that, in order to raise the presumption under Section 4(1) of the Prevention of Corruption Act, 1947, what the prosecution has to prove is that, the accused person has received gratification other than legal remuneration, when it is shown that he had received a certain sum of money which was not a legal remuneration, then the condition prescribed by the section is satisfied and the presumption thereunder must be raised. Whereas under Section 114 of the Evidence Act, it is open to the court to draw or not to draw the presumption as to the existence of one fact from the proof of another fact and it is not obligatory to the court to draw such presumption. Under Sub Section 1 of Section 4 of Prevention of Corruption Act, however if a certain fact is proved, that is, where any gratification (other than legal gratification) or any value that is proved to have been received by an accused person, the court is required to draw a presumption that, the person received that thing as

a motive of reward such as is mentioned in Section 161 of Indian Penal Code. Therefore the court has no choice in the matter, once it is established that, the accused person has received a sum of money which was not due to him as a legal remuneration. Of course, it is open to that person to show that, though the money was due as legal remuneration, it was legally due to him in some other manner or he had received it under a transaction or an arrangement which was lawful. The burden resting on the accused person in such a case would not be light, as it were a presumption is raised under Section 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that, explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The word unless the contrary is proved which occur in this provision make it clear that, the presumption has to be rebutted by proof and not by a bare explanation, which is merely plausible. The fact is said to be

proved, when existence is directly established or when upon its material upon the material before it, the court finds its existence to be so probable that a reasonable man could act on the supposition that it exists. Unless therefore the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted.

11. It is further observed in the same decision that, the question whether presumption of law or fact stand rebutted by the evidence or other material on record is one of the fact and not of law and the Supreme Court is slow to interfere with the view of facts taken by the High Court. No doubt, it will be open to the Supreme Court to examine the evidence by itself where the high court has proceeded upon an erroneous view as to the nature of presumption or again where the assessment of facts made by the high court is manifestly erroneous.

12. The same view has been reiterated in the decision reported in **(AIR 1975 SC 1432) Sita Ram v.**

State of Rajasthan. In the decision it has been observed that, in order to attract an offence under Section 161 of the Indian Penal Code, the following ingredients must be proved:

(1) that the accused was a public servant,

(2) that he must be shown to have obtained from any person any gratification,

(3) the gratification should be other than legal remuneration as a motive or reward for doing by way of act, for showing or forbearing to show in exercise of his official position in favour or disfavour of the person.

13. It is observed in the same decision that, when the first two ingredients are proved by evidence, then a rebuttable presumption arises in respect of the third ingredient. In the absence of proof of first two facts, the presumption does not arise. On mere recovery of certain money from the possession of the accused without the proof of its payment by those person to whom official favour was to be shown, the presumption cannot arise.

14. In the decision reported in **Mahesh Prasad Gupta v. State of Rajasthan (1974 Crl.L.J. 509)**, the

Supreme Court has held that, it cannot be contended that the presumption under Section 4(1) can be raised, only if the prosecution establishes in the first instance as the amount paid otherwise than by a legal remuneration. Such a contention is contrary to the clear terms of Section 4(1) and would render illusory in the presumption arising under Section. To postpone the prosecution, the burden proving that, the amount was accepted by the accused otherwise than by way of legal remuneration, as the prosecution to prove that, the amount was paid and accepted by way of bribe. In the same decision it has been observed that, the accused can establish his case to rebut the presumption under Section 4(1) by preponderance of probabilities.

15. In the decision reported in **Balakrishnan v. The State by Special Police Establishment Madras Branch (1994 Crl.L.J. 1258)**, the Madras High Court has held that, if the satisfactory explanation of the accused is sufficient to raise preponderance of probability, as to how

he came in the possession of the amount and it is a lawfully obtained amount, which he entitled to receive is sufficient for rebuttal of the presumption.

16. In the decision reported in **State of Assam v. Krishna Rao and Another (AIR 1973 (SC) 28)**, the Supreme Court has held that, mere factum of receipt of money arises the presumption under Section 4(1) of the Act and the receipt with guilty conscious is not necessary for raising the presumption.

17. In the decision reported in **Chaturdas Bhagwandas Patel v. State of Gujarat (AIR 1976 (SC) 1497)**, the Hon'ble Supreme has held that, where the prosecution had proved that, the accused, Head Constable, had accepted a gratification of ₹500/-, which was not his legal remuneration from-G, the statutory presumption under Section 4(1) was attracted in full force and the burden has shifted on the accused. It is true that, the burden which rests on the accused to displace this presumption is not as

onerous as that cast on the prosecution to prove its case. Nevertheless the burden on the accused is to be discharged by bringing on record evidence circumstantial or direct which establishes with reasonable probability that the money was accepted by the accused other than as a motive or reward such as is referred to in Section 161. It is further observed in the same decision that, to constitute an offence under Section 161, it is enough, if the public servant who accepted the gratification, takes it by inducing a belief or by holding of that, he would render assistance to giver with any other public servant and the giver gives the gratification under that belief. It is further immaterial, if the public servant receiving the gratification does not intend to do the official act favour or forbearance which he holds himself out as capable of doing.

18. In the same decision it is further observed that, when a public servant being a police officer, is charged under Section 161 of Penal Code and it is alleged

that, the illegal gratification taken by him for doing or procuring an official act, the question whether there was any offence against the giver of the gratification which the accused have investigated or not is not material for that purpose. If he has used his official position to extract illegal gratification, the requirement of the law is satisfied. It is not necessary in such a case for the court to consider whether or not the public servant was capable of doing or intended to do any official act of favour or disfavour.

19. In the decision reported in **Sat Paul v. Delhi Administration (AIR 1976 (SC) 294)**, it has been observed that, there is no absolute rule that evidence of the interested witnesses cannot be accepted without corroboration. But, where the witnesses have poor moral fibre and have to their discredit a load of bad antecedents which indicates their having a possible motive to harm the accused who was an obstacle in their immoral activities and it would be hazardous to accept the testimonies of such

witnesses without corroboration on crucial points from independent sources. In the same decision, while considering the question of appreciation of evidence under the Prevention of Corruption Act, where the prosecution witnesses were proved to be pimps and facing trial under suppression of immoral traffic in woman and girls, in the circumstances of the case, it was held that, it could not be said that the prosecution witness had no motive to falsely implicate the accused.

20. In the decision reported in **State of Tamil Nadu v. Rajendran [2000 (SCC) (Cri) 40]**, it has been observed that, omission to offer an explanation or offering of a false explanation by the accused in response to the question regarding an incriminating circumstance held is an additional link in the chain of circumstance to make them complete and the conduct of the accused in certain circumstances may be relevant and taken as a circumstance against him, if it casts doubt regarding his explanation.

21. In the decision reported in **Tarsem Lal v. State of Haryana (AIR 1987 (SC) 806)**, it has been observed by the Supreme Court that, when the trap laid, money was recovered from the purse of the accused and if no explanation was given by the accused at the time of search and recovery, but it was given at trial that, he received the money for depositing it in a small savings scheme is an after thought and it cannot be relied on.

22. In the decision reported in **Sarupchand v. State of Punjab (AIR 1987 (SC) 1441)**, it has been observed that, while laying the trap, currency notes containing phenolphthalein powder given to the accused and colour of the solution of Sodium carbide turning pink on dipping the fingers of the accused and pocket of the coat in which the currency notes were kept in the solution, in the absence of any explanation as to why the accused was given money and while he kept the same in his pocket, conviction is proper. In the same decision, it has been observed that,

complainant and prosecution witnesses belonging to same patti, inference of witness having given evidence against the accused on account of relationship with the complainant cannot be drawn.

23. In the decision reported in **Ayyasami v. State of Tamil Nadu (1992 Cri. L.J. 608)**, the Supreme Court has held that, if there is no independent evidence regarding the demand of bribe and if the evidence is not sufficient for proving the guilt against the accused beyond reasonable doubt, conviction based merely on probabilities is unsustainable in law.

24. In the decision reported in **Mohd. Nazeeruddin v. State of Andra Pradesh (1994 Cri.L.J. 2304)**, when a public servant demanding commission for paying amount for the work completed and the same was received to meet the expenses of audit party and demand or liability to make such payment not legally sanctioned, then the amount collected by the accused thus amounted to

accepting illegal gratification. The plea of the accused that, the amount was received at the behest of superior officer is not tenable, in view of non-examination of the said officer.

25. In the decision reported in **Dr. V. Sebastian v. The State (1988 Cri. L.J. 1150)**, it has been observed that, a rule of presumption created by Section 4 of the Act is that, when it is proved that a public servant has accepted any gratification, it shall be presumed that the acceptance was as a motive or reward such as is mentioned in Section 161 of Indian Penal Code. The presumption does not apply in a case of criminal misconduct envisaged in Section 5(1) (d) of the Act, though the trial for the offence under Section 161 of Indian Penal Code is brought in within the scope of Section 4. The consequences is that, the accused succeeds in squirming out of Section 161 of Indian Penal Code, the burden will remain on the prosecution to prove that, the gratification received was illegal or corrupt. The word 'gratification' occurring in Section 161 of Indian Penal Code

has to be given its liberal dictionary meaning, when it is shown that, the public servant has received any amount or money which is not illegal remuneration, but further question has to be considered is whether the receipt is for doing or forbearing to do any official act. An attempt was made before that and it was not part of the official functions of the Municipal Heal Officer to issue life certificate and that such certificate can be issued by any public servant holding gazetted post.

26. The language used in Section 161 of Indian Penal Code does not justify narrowing down of the scope of the words 'official Act'. A public servant may have power to do certain official acts by virtue of the rank he holds as a public servant, he may get other powers by virtue of the office which he holds. When he exercise either the powers, his act is official, no line of distinction can be made as between the acts in exercise of a particular office and act in exercise of his position as a public servant. If the act is

done with his official capacity as distinguished purely from his private capacity, it amounts to official act. Even he does not come within the scope of the functions of the office, the act does not cease to become official act. Further in the same decision, it has been observed that, if the receipt of the amount by the public servant is proved, then Section 4 of the Prevention of Corruption Act cast the burden of the appellant to prove that, the amount of gratification received by him was not a reward for issuing or doing any act. In the same decision, it has been observed that, there is no parameter to measure the intention or even the mental disposition of any person and therefore the court will observe the facts of the case in such a way as to listen the intention of the offender. Therefore, no public servant can be held to contend that he received the bribe money, as he was in the practice of receiving lawful remuneration. If such an argument finds acceptance, it would lead to preposterous consequences.

27. In the decision reported in **M.O. Shamsudhin v. State of Kerala (JT 1995(3) SC 367)**, it has been observed that, it is generally accepted by person offering a bribe to a public officer is in the nature of an accomplice, in the offence of accepting illegal gratification, but the nature of corroboration required in such cases should not be subjected to the same rigorous test which are generally applied to a case of an approver. Though bribe givers are generally treated to be in the nature of accomplice, but among them, there are various types and gradation. In cases under the Prevention of Corruption Act, the complainant is a person who gives the bribe in a technical and legal sense because in a trap case wherever the complaint is filed, there must be a person who has to give money to the accused, which in fact is the bribe money, which is demanded and without such a giving the trap cannot succeed. When there is such a demand by the public servant from the person who is unwilling and to do public

good approaches to the authorities and lodges complaint, then in order that trap succeeds, he has to give the money. There could be another type of bribe giver, who is always willing to give money in order to get his work done and having got the work done, he may sent a complaint. He is a *particeps criminis*, in respect of the crime committed. Thus there are grade and grades of accomplices and therefore a distinction could as well be drawn between the cases where a person offers a bribe to achieve his own purpose and where one is forced to offer bribe under a threat of loss or harm that is to say under coercion. A person who fall in this category and who becomes a party for laying a trap stand on a different footing because he is only a victim of threat or coercion to which he was subjected to. Where such witnesses found under the category of accomplices, by a reason of their being bribe givers in the first instance, the court has to consider the degree of complicity and then look for corroboration, if necessary as a rule of prudence. The

extent and nature of corroboration, that may be needed in a case may vary having regard to the facts and circumstance.

28. In the same decision, it has been observed regarding the purpose of corroboration as it is not mere evidence tending to confirm other evidence. The purpose of corroboration is not to give validity or credents to evidence, which is deficient, suspect or incredible, but only to confirm and support that which as evidence is sufficient, satisfactory, credible and corroborative evidence will only fill its role, if it itself is completely credible.

29. In the decision reported in **Laxmi Narain Goyal v. State of Rajasthan (1997(3) Crimes 541)**, Rajasthan High Court has held that, the burden of prosecution does not become less even in cases where defence of the accused did not appear credible or was palpably false neither the decoy witnesses nor to motbir witnesses supported the prosecution case on two important facts of making demand of money and passing of currency

notes to him as illegal gratification. Currency notes were recovered from open almirah having no doors and the complainant had sufficient time and opportunity to place them in the almirah in the absence of the appellant. Complainant got electric connection along with his associates under a group scheme of providing electric connection. It has been observed that in such circumstances, conviction cannot be sustained.

30. In the decision reported in **Prakash Chand Jain v. State (1968 Cri. L.J. 391)**, it has been observed that, where the accused charged with bribery alleged that the complainant thrusts the currency notes into his pocket against his will, but against which he had not protested or preferred any complaint about such assault and further without offering any explanation of facts and circumstances appearing against him merely remained contend with false denial, such a conduct of the accused could not be taken to indicate his innocence, more so, when the accused was not

an ignorant or helpless man, but a Government servant possessing considerable self confidence and intelligence. In the same decision, it has been observed that, false denials of an accused can be considered an adverse inference against him, although by themselves and individually like mere silence of the accused person, they cannot have a very damaging effect. However, it is not correct to say that, silence of the accused cannot be taken as a corroborative circumstance and the decree of weight to be attached to the silence of the accused depends on nature of his case. In the same decision it has been observed that, whereas an optional presumption of fact under Section 114 of the Evidence Act can be repelled by reasonable explanation, the very specific statutory obligatory presumption of law under Section 4 of the Prevention of Corruption Act cannot be so repelled without actual proof of facts explaining the acceptance of a reward.

31. In the decision reported in **Sultan Ahmed v.**

State of Bihar (1974 Cri. L.J. 895), it has been observed that, when the trap party had approached the accused after the acceptance of the amount from the complainant. If it was proved that, the accused looked perplexed and did not come with an explanation at that time, but only much later, after recovery of the currency, he came with some explanation in the circumstances it was held that, it is an after thought, unless the accused is able to prove the circumstances under which he could not come out with such explanation and that explanation is proved by facts that, what was intended by him by receiving the amount is legally entitled to be the recovered amount from the giver for the purpose of doing certain official act in his favour.

32. In the decision reported in **A. Subair v. State of Kerala (2009 (6) SCC 587)**, it has been observed that, if the complainant and the investigating officer were not examined in the case and there is no explanation forthcoming for their non-examination, court cannot draw

assumption and presumptions regarding illegal demand and payment without substantive evidence to prove the same and convict the accused on such surmises and assumptions. Same view has been reiterated in the decision reported in **State of Kerala and Another v. C.P. Rao (AIR 2012 SC Crl. 911)** and **Banarsi Dass v. State of Haryana (AIR 2010 SC 1589)**. In that decision, it has been observed that mere proof of recovery of bribe money from the accused alone is not sufficient to convict him for the offence under Section 5(2) of the Prevention of Corruption Act 1947, unless the demand of the amount has been established by the prosecution.

33. In the decision reported in **B. Jayaraj v. State of Andra Pradesh (2014(4) SCALE 81)**, it has been observed that, demand of illegal gratification is sine qua non to constitute offence under Section 7 of the Prevention of Corruption Act, 1988. Mere recovery of currency notes cannot constitute offence under Section 7, unless it is

proved that the accused voluntarily accepted the money knowing it be bribe. Presumption be drawn under Section 20 of the Act only in respect of offence under Section 7 and not under Section 13(1)(d) (i) (ii). The same view has been reiterated in the decision reported in **Narendra Champaklal Trivedi v. State of Gujarat (2012(7) SCC 80)**.

34. In the decision reported in **Punjabrao v. State of Maharashtra (2002(10) SCC 371)**, it has been observed that the accused can establish his defence by preponderance of probabilities. If the explanation offered by him under Section 313 of the Code of Criminal Procedure is found to be reasonable, then it cannot be thrown away merely on the ground that he did not offer the said explanation at the time when the amount was seized.

35. In the decision reported in **Mohmoodkhan Mahboobkhan Pathan v. State of Maharashtra (1997 (10) SCC 600)**, it has been held that, if there is reason to

doubt that, what was received by the accused was towards lawful charges, he is entitled to the benefit of doubt.

36. It is clear from the above decisions that, once it is proved by the prosecution that the accused had made demand and received the amount, then the presumption under Section 20 of the Act will be attracted. In such cases, court has no other option, but to draw such a presumption, unless the contrary is proved by the accused. Once such presumption is drawn, then the burden is on the accused to prove that, the amount received by him is an amount which he is legally entitled to receive authorised by law or legally due to him. Mere assertion or suggestion given for that purpose is not sufficient to discharge the burden cast on the accused. But at the same time, the liability cast on him is not as onerous as that of the prosecution proving its case beyond reasonable doubt. He can prove his case by preponderance of probabilities as well. But, that probability must be proved by evidence and that probability must be

reasonable and capable of acceptance as well.

37. It is also settled law that, normally, if the accused is not able to explain the reason for receipt of the amount at the time of seizure itself, any explanation given by him can be treated only as an after thought. But at the same time, in certain circumstances, if the explanation given by him at a later stage of the trial at the time of his 313 examination or bringing out certain facts in the prosecution evidence itself shows that, the receipt of the amount is not an illegal gratification received by him to do a favour, using his official position to the giver of the reward, but what is demanded and received by him is an amount payable by the giver for doing the alleged favour in favour of such giver as authorised by law, then, merely because this defence was taken by him at a later stage alone is not a ground to discard that explanation given by the accused during trial. Court has to consider whether the explanation is probable believable and acceptable and it is reasonably

established by evidence and facts adduced by the accused. If such an explanation is possible and acceptable, then, that benefit must be given to the accused. It is not necessary that, the person who is making demand will be able to do that act by himself, but if he induces other person to pay the amount on the promise that, he will be able to get it done through the appropriate authority using his official position, then his act will be deemed to be an act done by him, using his official position to make a favour by receiving an illegal gratification and that will fall under Section 7 and Section 13(1)(d) of the Act.

38. With the above principles in mind, the case in hand has to be considered to find out whether the prosecution had established its case as required under law and if so, the accused had rebutted the presumption available under Section 20 of the Act.

39. The counsel for the appellant submitted that sanction in this case was granted by the Secretary of

Vigilance Department, who is not the appointing authority and the sanction authority as far as the appellant is concerned and so Ext.P1 sanction proved through PW1 given by Principal Secretary to Home is not valid and as such sanction required under Section 19 of the Act has not been obtained and the prosecution is bad for want of sanction. But this contention was repelled by the Division Bench of this court in the decision reported in **Krishna Iyer v. State of Kerala (2005(1) KLT 391)**, wherein sanction for prosecution passed by the Secretary of the Vigilance Department have taking cognisance of an offence against any officer working under any department of the Government is legal and valid. This view has been earlier accepted by this court in the decision reported in **Udayakumar v. State of Kerala (2001(2) KLT 895)** and this was approved by the Division Bench in Krishna Iyer's case(supra). So the submission made by the counsel for the appellant that the sanction granted by the Principal

Secretary Home and Vigilance is not valid has no force and the same is liable to be rejected.

40. The fact that, the appellant demanded certain amount and that was paid by PW2 and it was seized by the trap party on 31.03.1997 and the accused was arrested etc., are not in dispute.

41. The case of the prosecution was that, PW2 was having a property on the side of national highway at Onamthuruth in Cherthala Taluk. It is also an admitted fact that he had constructed a private road from his property to the national highway by filling earth as a slope, as on account of the construction of the national highway, his property has been made to a lower level than the newly established national highway. It is also an admitted fact that, after the construction of that pathway, the appellant had noticed this and asked PW2, as to whether he had obtained any permission from the department for that purpose and when he told that he had not obtained any

permission, he was asked to come to the office as there were certain formalities to be done before doing that act and if he came to the office, he would help him for that purpose. It is also an admitted fact that, on the basis of that, he went to the office of the appellant and as instructed by him, he had prepared Ext.P3 document in a stamp paper on the basis of the draft agreement given to him by the appellant for this purpose. The case of PW2 was that, originally the appellant demanded ₹2,000/- for that purpose and he had insisted to pay the same and according to Ext.P2 statement given by him, he had met him at Ponnampally where a bridge construction was in progress under the supervision of the appellant and he asked about the same and at that time he wanted him to come to his office with an amount of ₹2,000/- and again he met him and at that time he gave ₹200/- to him and he also wanted him to come with the balance amount of ₹1,800/- to the office and when he told that he was unable to pay that amount, it was reduced

to ₹1,000/- and that was done from the office at Edappally on 29.03.1997. When he told that, he had already given ₹200/-, he wanted him to come with the balance amount of ₹800/-. But at the time of evidence, he had a different case. The amount of ₹2,000/- itself was mentioned by him, when he went to the office on the first time itself, when he was asked to prepare an agreement in a stamp paper and it was thereafter he had paid ₹200/- to him at Ponnammveli that was according to him two or three days prior to giving Ext.P2 complaint to the Dy.S.P. When he was examined before the court, he was not able to give the exact dates of demand and payment of that amount. In the chief examination, earlier he had stated that, the amount was reduced to ₹1,000/- by the accused on 24.03.1997, but when it was asked in the chief examination as to whether it was on 29.03.1997, he had stated that, he did not remember the date.

42. According to PW2, when he gave Ext.P3

stamp paper agreement, the appellant told that, unless the amount was brought, it could not be done. He had further stated that, even on the day on which the amount of ₹2,000/- was asked, he wanted to file a complaint and on the next day, he went to the office of Dy.S.P. and gave a complaint. But he had corrected the same and stated that, it was not on the next day, but on 30th, six or seven days prior to this, the amount was demanded by the appellant from his Edappally office. Even during that time, he never felt that, complaint had to be filed. According to him, he had seen the appellant at Ponnammveli on one occasion only and it was after the amount was reduced to ₹1,000/- and it was thereafter he had paid ₹200/- to him. He had also stated that, the amount was reduced after the plan was prepared. He had also stated that, the Assistant Executive Engineer Sri. Achuthan Pillai had come to his place two or three days prior to giving Ext.P3 agreement. He denied the suggestion that, appellant had told that the amount required was for

restoration charges to ratify the act of PW2 in forming a road.

43. PW3 was one of the trap witness, had deposed about the demonstration made by PW9 regarding of trap from his office and preparation of the pre-trap mahazar(PW3) and thereafter, the things happened in the office of the appellant. He had admitted that, he could not see PW2 giving amount to the appellant, but after giving the amount, PW2 came out side and gave signal as instructed from the office of the Dy.S.P., which he passed on to Dy.S.P., and it is thereafter that they went to the office of the appellant and recovered the amount. He had further stated that, apart from the appellant, one contractor and office staff were there in the office. But he had admitted that, in Ext.P5 mahazar that fact was not mentioned. He had further stated that, he did not notice the fact that when the left hand finger of the appellant was dipped in the lime water solution, it was not turned dark pink, but it has

become only light pink. According to PW2, the appellant received the amount by using his right hand and then shifted to the left hand and then placed the same in his pant pocket. Since the appellant had admitted the fact of receipt of the amount and seizure of the amount by the trap party headed by the Dy.S.P., any discrepancy in the evidence of PW3 is not much relevant in this case.

44. The evidence of PWs 4 and 5 are not much relevant, as they have only attested the mahazers prepared for seizing certain documents. PW5 had also stated in the cross examination that, the restoration charges will be paid in the office and restoration of charges will be collected, if anything has been done by a private party, causing damage to any portion of the national highway. He had also admitted that, the proceedings will be drawn by Resident Engineer and Assistant Executive Engineer and there is a slab for fixing the restoration charges. PW6 was examined to prove certain documents relating to the appellant's tour

and T.A. bill. He had admitted that, Ext.P13 is the tour diary and T.A. bill relating to the appellant for the month of March, 1997, in which the signature of the appellant and himself were there. He had further stated that, in Ext.P13, after 11.03.1997, there was nothing to show that appellant had gone to Ponnammveli. It will be seen from this evidence that the evidence given by PW2 that he had met the appellant at Ponnammveli two or three days prior to the filing of the complaint and he had paid ₹200/-, appears to be not correct, as it will be seen from Ext.P13 that the appellant had not gone there after 11.03.1997 during March, 1997. But the court below had come to the conclusion that, even without entering the same in the tour diary, he would have gone there and received the amount on the basis of surmises and assumptions without any acceptable evidence appears to be unsustainable in law. According to him, he came there in an Ambassador car and if he was using the official car, then that could have been found a place in the

tour diary on that particular date. He had also admitted that notice under Section 11(2) of Land Conservancy Act was issued to PW2 for construction of private road from the national highway without the consent of the department. He had also admitted that, the action was initiated for collection of restoration charges by the Assistant Engineer, then it will be sent to Assistant Executive Engineer along with six sets of application and documents and if the Assistant Executive Engineer is recommending the same, then four copies will be sent to Executive Engineer and after verification, Executive Engineer in time will send the same with his recommendation to Superintending Engineer and after verification by the Superintending Engineer, it will be sent to Chief Engineer for final approval and after the approval by the Chief Engineer and drawing the proceedings granting sanction it will be same to Executive Engineer and on receipt of the same, the Executive Engineer will issue the proceedings and give a copy to the

party and the copy will be sent to Assistant Executive Engineer and Assistant Engineer also. The Assistant Engineer had no authority to collect restoration charges and it will take 5 to 6 months for completing the formalities and there was no case of ratification in such cases. He had also stated that, he did not see PW2 and he did not inspect his property. But the evidence of PW2 will go to show that prior to his meeting of the accused from his office when he gave Ext.P3, PW6 had gone to the place. He had further stated that in Ext.D3(a), in a proceedings of the Executive Engineer dated 11.09.1995, an amount of ₹14,500/- was directed to be deposited before the Assistant Engineer national highway, but he had stated that, it was a mistake for Assistant Executive Engineer, but he denied the suggestion that Ext.D3(a) was sent by the Assistant Executive Engineer delegating the power for receiving the amount to the Assistant Engineer.

45. PW6 had stated that Assistant Engineers

have no power to initiate proceedings for collection of restoration charges. Further court below also came to a conclusion that, the Assistant Engineer has no power under the Kerala Land Conservancy Act to initiate proceedings for collection of restoration charges. It will be seen from SRO 791/74 that, the powers of the Collector under Section 11 of the Land Conservancy Act (hereafter called 'the Act') was conferred on all Assistant Engineers of National Highways. This is the power given to the Collector under the Act, for removing unlawful encroachment over Government purampoke lands. As regards the national Highways are concerned, such power has been given to the Assistant Engineers also as per the above notification. Once an unauthorised occupation has been detected on the national highway, then officials are having power to initiate proceedings against such persons. It will be seen from the evidence of PW2 himself that, after he had formed the approach road to his house, which is lying in the lower level

than the national highway, by filling earth during March, 1997, the appellant had come and asked him whether he had obtained necessary permission for the same and he told that he was not aware of the procedure. It was on that basis, that he was summoned to his office at Edappally, thereafter he gave Ext.P3 application in stamped paper along with Ext.P3(a) plan. It is also in away admitted by PW6 that, if proceedings for collection of restoration charges were initiated by the Assistant Engineers, he will have to send the application with his recommendations to the Assistant Executive Engineer, who with his recommendations will forward the same to the Executive Engineer, who in turn will send the same to the Superintending Engineer from where it will go to the Chief Engineer, who will be the ultimate authority to accord sanction. After getting sanction from the Chief Engineer, proceedings will be issued by the Executive Engineer, which will be forwarded to the Assistant Executive Engineer and

Assistant Engineer for implementation. PW2 had also deposed that, the Assistant Executive Engineer(PW6) also had come and visited the property after the appellant had visited the same, but this was denied by PW6. There is no need for PW2 to give any false evidence against PW6 on this aspect. Further it will be seen from Ext.D3(a) that, the amount ordered to be collected as restoration charges was directed to be paid to the Assistant Engineer. This was admitted by PW6, but according to him, it was a mistake and the Assistant Engineer has no power to collect the same. He had not produced any document to show that this amount was not received by the Assistant Engineer, but received either by the Executive Engineer or by the Assistant Executive Engineer as claimed by him.

46. It will be seen from Ext.D2 file that, notice under Section 11(2) was issued to PW2 by the appellant under the seal of Assistant Executive Engineer, National Highway. Merely because, the seal of the Assistant

Executive Engineer was affixed is not a ground for disbelieving the notice issued. This was dated 11.03.1997. PW2 had no case that any part of the transaction alleged by him which led to the filing of complaint had taken place prior to 11.03.1997. So that probabilise the case of the appellant that, when Section 11(2) notice under the Land Conservancy Act was issued, PW2 came to his office and he had explained the procedure and it was on that basis that he had submitted Ext.P3 on a stamped paper. It is true that, there is nothing on the file to show that, this was served on the party. The appellant had admitted in his statement filed under Section 313(5) of the Code of Criminal Procedure that, earlier he told that, approximately an amount of ₹2,000/- would be required and when the estimate was prepared, he told that he will have to remit ₹800/-, as it will be seen from Ext.D2(b), that estimate was for an amount of ₹786/-. Further it was admitted by PW2 that the amount was reduced to ₹1,000/- when Ext.P3 was

submitted and he has also admitted that thereafter he demanded only ₹800/-, so the amount earlier suggested may be an approximate amount for restoration of charges to be payable by PW2, if his action was ratified by the authorities.

47. Further it will be seen from Ext.D2 file that, in similar occasions, when encroachment by making construction and forming road was detected, on the basis of the undertaking given by the parties, the same was allowed to continue or permitted to be established on remission of some restoration charges, in case they have to remove the construction or pathway established touching the National Highway on a later occasion. The evidence of PW2 also will go to show that he is not consistent about the dates on which the amounts were demanded and the amount was paid also. Further the evidence of PW2 will go to show that, he was not having any intention to file any complaint when the appellant alleged to have made the first demand of ₹2,000/-. Further he had agreed to pay ₹200/- also. In

Ext.P1, his case was that, after paying ₹200/- he insisted for further amount of ₹1,800/- and it was thereafter the amount was reduced to ₹1,000/- and then to ₹800/-. He was not consistent regarding these aspects, when he was examined before the court. Earlier he had given a different version regarding these aspects, when he was examined before the court and when the statement given in Ext.P1 was confronted to him, he had stated that what ever stated in Ext.P1 was correct and whatever stated by him before court is not correct. If the statement given in Ext.P1 is accepted to be a real transaction, then, what ever stated by him before court is not consistent with what was stated in Ext.P1.

48. Further, from his conduct, it will be seen that, he was not agitated or aggrieved person on the appellant making the demand wanted to make a complaint at the first instance itself, but he was amenable to pay ₹200/- according to him so as to retain his pathway made by

him and it is thereafter that he wanted to file a complaint. Further it was admitted by PW2 that, after Ext.P3 and P3(a) plan were submitted, that the amount was reduced and it was after reducing the amount he had to pay ₹200/-, but that was not the case in Ext.P1. So it cannot be said that, PW2 was a person who was not interested in paying the amount and he was really aggrieved by the demand and he was compelled to pay the amount that prompted him to file the complaint. The court below did not rely on Ext.D2(a) and D2(b), only on the ground that there is nothing on record to show that it was sent on the parties or sent to the higher authorities, but the conduct of PW6 denying his inspection of the site which according to PW2 had occurred, will go to show that, he was also trying to hide something which had transpired resulting in sending Ext.D2(a) notice and D2(b) proceedings. If the amount of ₹1,000/- was fixed, when he gave Ext.P3 application on 29.03.1997, then, there was no possibility of paying ₹200/- to the appellant by PW2

as claimed by the prosecution. So under the circumstances, the character of PW1 will come under one of the categories mentioned in **M.O. Shamsudhin v. State of Kerala (JT 1995(3) (SC) 367)**, then such evidence has to be relied only on caution and may require corroboration. So under the circumstances, the evidence of such witnesses will have to be evaluated cautiously by the court before accepting their evidence without corroboration. In the same decision, it has been observed that, in such cases, if the trap witnesses did not support the demand and receipt of the amount, it cannot be said that, prosecution has proved beyond reasonable doubt the demand and acceptance of the amount as contemplated under Section 7 of the P.C. Act.

49. Further it is seen from the evidence of PW3, the decoy witness and the investigating officer /PW8 that, at the time when the alleged trap was conducted, apart from the appellant, one staff and a contractor were present and they were sitting in front of the appellant. Further

according to PW2, the appellant made the demand in their presence on the second occasion and it was from there he had paid the amount also. Person who is demanding bribe and accepting the same will not normally do it in the presence of outsiders. Further the presence of these persons though admitted by PW3 and PW8/ investigating officer, their presence was not mentioned in the recovery mahazar/ Ext.P5. Though PW8 had stated that, he had questioned the contractor, he was not made as a witness. If really the demand and acceptance were made in the presence of these two persons, then, they would have been the best witnesses to speak about the same and not citing them as witnesses by the prosecution throws some suspicion about the case of the prosecution itself. The said contractor was examined as DW1 and he had explained the circumstances under which the amount happened to come in the possession of the appellant. The possibility of the amount being entrusted to the appellant anticipating

ratification of collection of restoration charges and insisting PW2 to accept the same cannot be ruled out under such circumstances. The evidence of DW1 was not seriously cross examined as well. Though a suggestion was given that, he is giving such a statement to help the appellant as he happened to be a contractor and the appellant was the person who has to approve his bills for his contractor work, which he denied was taken as a ground to disbelieve his evidence and that appears to be unsustainable in law and no such generalised opinion can be formed, unless his presence on that place itself was found to be suspicious, but the evidence of prosecution witnesses itself will go to show that, he was present at that time when the alleged demand and acceptance were said to have been made by the appellant. So not citing them as witnesses to the incident by the prosecution throws suspicion about the actual things that has to be transpired in that place, especially when the decoy witness and the trap laid officer have deposed before

the court that, they have not seen the actual demand or receipt of the amount by the appellant. Decoy witnesses are deployed for over hearing the conversation between the bribe giver and bribe acceptor and to prove the demand and acceptance by the accused person. But in this case, the decay witness did not speak about these two aspects.

50. So in view of the discussions made above and also applying the principles laid down in the decisions relied on by both the sides that, mere recovery alone is not sufficient to come to the conclusion that the prosecution has proved beyond reasonable doubt that the demand and the acceptance of the amount received, is an amount which is not legally to be recoverable from the complainant. But the circumstances and the documents produced will go to show that, the encroachment was detected by the appellant and the proceedings were initiated under Section 11 of the Act and it is thereafter that the incident had taken place and the amount said to have been claimed by the appellant

appears to be the restoration charges which has to be collected from the complainant, if sanction has been obtained from the higher authorities as seen from Ext.D2(b) estimate prepared by the appellant and said to have been sent to PW6 for further action in this regard. The conduct of PW2 to get his things done also will go to show that he had entrusted the money with the appellant on the assumption that the amount claimed was an illegal gratification though the appellant had told him that this can be obtained only after getting sanction from the higher authorities cannot be ruled out, coupled with the evidence of DW1 examined on the side of the appellant, who was really present at the time when the alleged trap was conducted, which was admitted by the prosecution witnesses as well. When two views are possible on the basis of the evidence adduced on the side of the prosecution and the appellant and one view projected by the appellant is also possible and that cannot be brushed aside lightly, then

that benefit must be given to the appellant to decide the question whether he had rebutted the presumption available under Section 20 of the Act which has not been done by the learned Special Judge in this case. So under the circumstances, the conclusion arrived at by the court below that, the prosecution has proved beyond reasonable doubt that the appellant had demanded illegal gratification and accepted the amount as a reward or motive for doing some favour to PW2, misusing his official position as Assistant Engineer of the National Highways and thereby he had committed the offence punishable under Section 7 and Section 13(1)(d) read with Section 13(2) of the Act and the conviction entered against the appellant for the said offences are unsustainable in law and the same is liable to be set aside. So the appellant is entitled to get acquittal of the charges levelled against him, giving him the benefit of doubt.

51. In view of the finding that, the prosecution

has failed to prove the case against the appellant beyond reasonable doubt and he is entitled to get acquittal, the sentence imposed against him is also not proper and the same is also liable to be set aside and I do so.

In the result, the appellant succeeds and the appeal is allowed. The order of conviction and sentence passed by the court below against the appellant under Section 7 read with Section 13(1)(d) read with Section 13(2) of the P.C. Act are hereby set aside and the appellant is acquitted of the charge levelled against him, giving him the benefit of doubt. He is set at liberty and the bail bond executed by him will stand cancelled. The fine amount if any remitted by the appellant is directed to be returned to him.

Office is directed to communicate this order to the concerned court, immediately.

Sd/-

K. RAMAKRISHNAN, (Judge)

// True Copy//

P.A. to Judge