

BAIL SLIP

The Appellants/Accuseds namely 1.C.U.Asokan S/o.Late Ulakan aged about 49 years, 2.N.Gopalaswamy, S/o.Late Nachimuthu, aged about 54 years were directed to be released on bail as per the order of this Court dated 5th day of July 2013 in M.P.Nos.1 & 1 of 2013 in CrI.A.Nos.456/2013 and CrI.A.No.464/2013 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.03.2015

CORAM:

THE HONOURABLE MS. JUSTICE R. MALA

Criminal Appeal Nos.456 and 464 of 2013

Date of reserving the judgment 12.03.2015	Date of pronouncing the judgment 17.03.2015
--	--

C.U.Asokan .. Appellant/A1 in
CrI.A.No.456 of 2013

N.Gopalswamy .. Appellant/A2 in
CrI.A.No.464 of 2013

v.

State rep. by
Inspector of Police
SPE/CBI/ACB, Chennai.
RC 45(A) of 2008

.. Respondent/Complainant

Prayer:Criminal Appeal No.456 of 2013 filed under Section 374(2) CrPC. and Criminal Appeal No.464 of 2013 filed under Section 374(2) Cr.P.C., against the judgment of conviction and sentence, dated 27.06.2013 made in C.C.No.9 of 2008 on the file of the learned II Additional District Judge/Special Judge (CBI Cases), Coimbatore.

For Appellant in
CrI.A.No.456/2013 : Mr.R.Karthikeyan
For Appellant in
CrI.A.No.464/2013 : Mr.V.Sivakumar

For Respondent : Mr.K.Srinivasan
Special Public Prosecutor for CBI Cases

C O M M O N J U D G M E N T

The Criminal Appeals arise out of the judgment of conviction and sentence, dated 27.06.2013 made in C.C.No.9 of 2008, on the file of the learned II Additional District Judge/Special Judge for CBI Cases, Coimbatore, whereby the accused were convicted as follows:

Accused	Offence under Section	Sentence
A1 and A2	120(b) IPC	To undergo each two years rigorous imprisonment and to pay a fine of Rs.2,000/- each in default in payment to undergo each six months simple imprisonment.
A1 and A2	7 of P.C. Act, 1988	To undergo each two years rigorous imprisonment and to pay a fine of Rs.2,000/- each in default in payment to undergo each six months simple imprisonment.
A1 and A2	13(2) r/w. 13(1)(d) of P.C. Act, 1988	To undergo each two years rigorous imprisonment and to pay a fine of Rs.2,000/- each in default in payment to undergo each six months simple imprisonment.
The sentences are ordered to be run concurrently.		

2.The case of the prosecution is as follows:

(i)P.W.2/Vasanthi is residing in Alarangadu Thottam, College Road in Tirupur along with her husband, P.W.4/Murugesan and her children. She had houses and Godowns in Tiruppur in her name as well as in her husband's name individually and she has been paying income tax from the year 2004 onwards. Her husband, P.W.4/Murugesan was admitted in Revathi Hospital at Tirupur for treatment during the end of August 2008. on 02.09.2008, when P.W.2 was not in her house, one Asokan/A1 Inspector of Income Tax Department went to her house and enquired about them to a tenant of her house, namely, P.W.7/Tmt.Vasanthi Annamalai and asked her to inform them to meet him at his office. P.W.2 told about the same to her husband/P.W.4, who was admitted in the hospital. P.W.4 told her to take his cousin brother, namely, P.W.5/Udayakumar, to Income Tax Office and to meet A1. On 10.09.2008, P.W.2 and P.W.5 went to the Income Tax Office, Tirupur and met A1, who had informed them that there was a complaint

against her and her husband for evading income tax and demanded Rs.25,000/- as bribe for not taking any action. A1 asked her to send the bribe amount through P.W.5 on the next day. Thereafter, P.W.2 and P.W.5 met his superior officer Gopalsamy/A2 and P.W.2 complained about the demand of bribe of Rs.25,000/- by A1, for which, A2 told her that he also knew the complaint against them and demanded Rs.25,000/- for not taking any action and also told them that if they refused to pay the bribe amount, he would file a false case against them. P.W.2 discussed the matter with her husband/P.W.4 and then decided to complain about it to the CBI. P.W.2 telephoned CBI Office, Chennai and complained about the bribe demanded by A1 and A2 to the CBI Officer, and he informed that one of his office Mr.C.S.Moni/P.W.13 would come to Tirupur on the next day and advised her to lodge a written complaint to him and then the CBI Officer collected cell phone numbers of P.W.2 and her husband.

(ii) On 11.09.2008, at about 7.00 a.m, P.W.13/Mr.C.S.Moni, Inspector, CBI, contacted her over phone and informed that he was staying in Vinayaka Hotel, Tirupur (Room NO.102) and asked her to come and meet him. P.W.2 along with P.W.5 met him at about 7.30 a.m. and gave the written complaint/Ex.P.2, in which, both of them signed. Then, P.W.13 sent the written complaint/Ex.P.2 to the Investigating Agency through Fax. Thereafter, P.W.13 asked them to come at 10.00 a.m. with Rs.50,000/- which has to be given as bribe. Accordingly, P.W.2 and P.W.5 went to the Hotel at about 10.00 a.m. along with the money. At that time, along with P.W.13, four other persons were there and apart from them, two officials from Insurance Companies, namely P.W.8/Chandrasekar and P.W.9/Swaminathan were also present. P.W.13 prepared Ex.P.3/Entrustment mahazar and phenolphthalein tests were explained.

(iii) After explaining trap proceedings, P.W.5 and P.W.9 went to the Income Tax Office in his bike and other officials followed them. P.W.5 stopped his bike at the Income Tax Office and went inside the office along with P.W.9. Thereafter, P.W.5 went to the room of A1 and gave the money (M.O.7) to him and then, he went to the chamber of A2 and gave the money (M.O.8) and then, P.W.5 came out and gave the pre-arranged signal. Then, P.W.13/C.S.Moni and P.W.14/Ponnalagan came with their party. The amounts seized from the accused were checked with the entrustment mahazar and found correct by P.W.14/Ponnalagan and M.O.2 to M.O.5 were seized. Ex.P.7 is the Recovery Mahazar. Thereafter, P.W.13/C.S.Moni produced the accused for remand. Then, as per the direction of the Superior Officer, P.W.13 handed over the case to P.W.18/Kalaimani for further investigation.

(iv) P.W.18/Kalaimani, Inspector, Vigilance and Anti Corruption as per the instruction of Superintendent of Police, based on the complaint/Ex.P.2 received through Fax from P.W.2 prepared the printed

FIR/Ex.P.25 against the accused under Section 7 of Prevention of Corruption Act.

(v) P.W.6/Mr. Daniel Raj, Income Tax Officer, submitted that there was no entry in TEP registers Ex.P.12 to Ex.P.14 for having received any complaint by the office of the Additional Commissioner of Income Tax, Tirupur and forwarded to Income Tax Officer for taking action against P.W.2.

(vi) P.W.10/Nithyanandan, the Manager of Vinayaka Hotel, in his evidence, deposed that P.W.14 and other officers stayed in Room No.202 and P.W.13 and other officers stayed in Room No.102 and through him, Ex.P.16 and Ex.P.20 were marked.

(vii) P.W.11/Muthusamy, Peon of the office of the accused submitted that no visitor's book was maintained for visitors and hence, he could not tell who came to meet the accused on 10.09.2008 due to long gap and he was on leave on 11.09.2008 and he did not know as to what has happened on that day.

(viii) P.W.12/Dhandapani, was working as Superintendent along with the accused has deposed about the presence of CBI Officers on 11.09.2008.

(ix) P.W.15/S. Balasubramanian, Additional Commissioner holding charge of the Tirupur Office submitted that Tax Evasion Petition/Ex.P.15 was signed by him and he had not seen any report of A1 on the petition.

(x) P.W.16/C. Bhaskaran, Senior Tax Assistant submitted that on 11.09.2008 the accused attended the office. He further submitted that there was no reception in their office and also no visitors register was maintained in the office. P.W.16 identified the signatures and hand writings of the accused persons on Ex.P.15, which is the file of his office in respect of tax evasion petition against P.W.2.

(xi) P.W.17/Krishnamoorthy, Stenographer, Income Tax Department, submitted that he will register the tax evasion petitions received by the Department, which is marked as Ex.P.22. He further submitted that he had not seen any tax evasion petition received against P.W.2.

(xii) P.W.1/Visalakshi, Scientific Assistant Gr.II (SG) (PW-1) submitted that substance of sodium carbonate and phenolphthalein were found in the material objects during her investigation and she issued a report/Ex.P.1. Then the materials collected during investigation by the Investigating Officer were sent to the Competent Authority for his sanction to prosecute the accused for the offence committed under Prevention of Corruption Act.

(xiii) P.W.3/Mr.Rajib Hota, Commissioner of Income Tax-III, Coimbatore, under Ex.P.4/Gazette notification bearing No.GSR.NO.997 (E) dated 07.10.1988 got power to appoint and remove the above said officers and he carefully perused the materials, applied his mind and satisfied himself that there is a prima facie case against the accused persons and then accorded sanction for prosecution against the accused persons, which is marked as Ex.P.5 and Ex.P.6.

(xiv) After obtaining Exs.P.5 & P.6/Sanction Orders from P.W.3 and after completing the investigation, P.W.18/Kalaimani, filed the charge sheet under Sections 120(b) r/w. 7 and 13(2) r/w. 13(1)(d) of Prevention of Corruption Act.

3. The learned Special Judge after following the procedure, framed necessary charges. Since the accused pleaded not guilty, the Special Court examined the witnesses P.W.1 to P.W.18 and marked the documents Exs.P1 to P25 and material objects M.O.1 to M.O.11 and placed the incriminating evidence before the accused and the accused denied the same in toto. The Special Court after considering the oral and documentary evidence, convicted and sentenced the appellant/accused as stated above.

4. Challenging the judgment of conviction and sentence passed by the Trial Court, the learned counsel for the appellant/A2 raised the following points:

(i) Even though sanction has been given by the Competent Authority, he has not applied his mind while according sanction. So the sanction itself is vitiated.

(ii) The ingredients of Section 120(b) IPC has not been made out.

(iii) There was no evidence to show that A1 and A2 had conspired and demanded illegal gratification.

(iv) There is no evidence to show that the demand of illegal gratification by A2.

(v) Second demand was not proved. Acceptance and recovery has also not been proved by the prosecution.

(vi) The Trial Court has failed to consider that on the Tax Evasion Application received by the Income Tax Department wherein A1 made an enquiry and given a report and that application has been received only by P.W.15, Additional Commissioner of Income Tax Department.

(vii) P.W.3, Commissioner, Income Tax Department, Sanctioning Authority in his cross examination, he has admitted that whenever an anonymous complaint of Tax Evasion is received by the Additional Commissioner of Income Tax Department, he is the authority to direct the Income Tax Officer to enquire about it and in pursuance to that, A1 has conducted an enquiry and gave a enquiry report on 25.08.2008. So, on the date of alleged demand on 10.09.2008 and 11.09.2008 has

not been proved by the prosecution.

(viii) Neither A1 and A2 is the Competent Authority to decide the Tax Evasion Petition. Receipt of the complaint/Ex.P.2 itself is doubtful.

(ix) Nothing has been recovered from A2. Phenolphthalein test has been ended in failure.

(x) Transmission report and visitors' register has not been filed.

He further submitted that the Trial Court has not considered the above aspects properly. To substantiate the argument, he relied upon the following decisions:

1. 2002 (5) SCC 86 (Subash Parbat Sonvane vs. State of Gujarat)
2. 1997 SCC (Cr1.) 1120 (Mansukhlal Vithaldas Chauhan vs. State of Gujarat)
3. AIR 1992 SC 644 (Ayyasami vs. State of Tamil Nadu)
4. 1990 SCC (Cr1.) 604 (State of U.P. vs. Ram Asrey)
5. 2006 (1) SCC (Cr1.) 520 (Union of India through Inspector, CBI vs. Purnandu Biswas)
6. 2014 Cr.L.J. 930 (C.B.I. vs. Asok Kumar Aggarwal)

5. The learned counsel appearing for the appellant/A2 would submit that he has also adopting the arguments advanced by the learned counsel appearing for A2. He would further submit that the evidence of P.W.2 and P.W.4 is contradictory with each other. He admits that at that time, he was not in the hospital. Since already enquiry report has been submitted on 25.08.2008, there is no necessity for him for demand. He would further submit that since they have filed a report, with a view to take vengeance against them, a false complaint has been given. Hence, he prayed for acquittal.

6. Resisting the same, the learned Special Public Prosecutor for CBI Cases would submit that P.W.3 is a Competent Person to accord sanction. After applying his mind alone he has accorded sanction. So the sanction is valid. He would submit that the evidence of P.W.5 is admissible evidence. And he is not an accomplice. He would further submit that non-production of original FIR is not fatal and visitors' register is also not fatal to the case of the prosecution. He would further submit that the Trial Court has considered all the aspects in proper perspective and came to the correct conclusion. Hence, he prayed for dismissal of the appeal.

7. Considered the submissions made on both sides and perused the typed set of papers.

8. The case of the prosecution is that P.W.2 is an Income Tax Assessee. Since she has not assessed the income in respect of rent received from the house property, P.W.15 received the complaint. P.W.2 met A1 on summons and at that time, she has stated that A1

demanded money for not taking steps in the complaint which was intimated to A2 and in turn, A2 also demanded illegal gratification on 10.09.2008. Hence, she gave a complaint on 11.09.2008 and trap proceeding has been initiated and after that, charge sheet has been filed.

Sanction

9.The first point raised by the appellant is that sanction is invalid for non application of mind. The competency of P.W.3, who is the Officer to accord sanction for prosecution is not disputed. The only dispute is that he has not applied his mind while according sanction because A1 and A2 received meritorious certificate for performing their duties. Furthermore phenolphthalein test is also negative in respect of A2. The report/Ex.P.1 itself shows that in the phenolphthalein test no colour has been changed but whereas the material objects received includes pink colour solution and that factum has not been considered by P.W.3. On perusal of the complaint/Ex.P.2 wherein it was specifically mentioned that on 02.09.2008 A1 has gone to the house of P.W.2 and at that time, they were not in the house, so he intimated to the inmates and asked her to come his office. In pursuance to that, on 10.09.2008 P.W.2 met A1 at his office and at that time, A1 demanded a sum of Rs.25,000/- for not taking steps on the petition and on 10.09.2008 that has been intimated to the Officer, Gopalsamy/A2 for taking action against A1 and in turn, A2 also demanded Rs.25,000/-, which shows that there is no meeting of mind between both the parties and that factum was not considered by P.W.3. He would further submit that P.W.3 has not perused the entire documents and he has accorded sanction without applying his mind mechanically.

10.The learned counsel appearing for the appellants relied upon the decision reported in 1997 SCC (Cr1.) 1120, wherein it was held that once there is no independent application of mind by the authority, it is bad. It is appropriate to incorporate the relevant paragraph, which reads as follows:

"14.From a perusal of Section 6, it would appear that the Central or the State Government or any other authority (depending upon the category of the public servant) has the right to consider the facts of each case and to decide whether that "public servant" is to be prosecuted or not. Since the Section clearly prohibits the Courts from taking cognizance of the offences specified therein, it envisages that Central or the State Government or the "other authority" has not only the right to consider the question of grant of sanction, it has also the discretion to grant or not to grant sanction.

15. In Gokulchand Dwarkadas Morarka V. The King, AIR 1948 PC 82, it was pointed out that:-

"The sanction to prosecute is an important matter, it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. They are not, as the High Court seen to have thought, concerned merely to see that the evidence discloses a prima facie case against the person sought to be prosecuted. They can refuse sanction on any ground which commends itself to them, for example, that on political or economic grounds they regard a prosecution of substance it is plain that the Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case."

16. In Basdeo Agarwalla v. Emperor, AIR 1945 FC 16, it was pointed out that sanction under the Act is not intended to be, nor is an automatic formality and it is essential that the provisions in regard to sanction should be observed with complete strictness. This Court in State through Anti- Corruption Bureau, Government of Maharashtra, Bombay vs. Krishanchand Khushalchand Jagtiani. (1996) 4 SCC 472, while considering the provisions of Section 6 of the Act held that one of the guiding principles for sanctioning authority would be the public interest and, therefore, the protection available under Section 6 cannot be said to be absolute.

17. Sanction lifts the bar for prosecution. The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to Government Servants against frivolous prosecutions. (See: Mohd. Iqbal Ahmed vs. State of Andhra Pradesh, AIR 1979 SC 677). Sanction is a weapon to ensure discouragement of frivolous and vexatious prosecutions and is a safeguard for the innocent but not a shield for the guilty.

18. The validity of the sanction would, therefore, depend upon the material placed before the sanctioning authority and the fact that all the relevant facts, material and evidence have been considered by the sanctioning authority. Consideration implies application of mind. The order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material placed before it. This fact can also be established by extrinsic evidence by placing the relevant files before the Court to show that all

relevant facts were considered by the sanctioning authority. (See also: Jaswant Singh vs. The State of Punjab, 1958 SCR 762 = AIR 1958 SC 12; State of Bihar & Anr. vs. P.P. Sharma, 1991 Cr.L.J. 1438 (SC))."

11.P.W.3, who has accorded sanction for A1 and A2, which is marked as Ex.P.5 and Ex.P.6, in his cross examination, he has fairly conceded that the work of A1 and A2 has been appreciated by the Higher Authorities as per Ex.D.2. In the Recovery Mahazar itself it was stated that A2 was asked by Ponnalagan/P.W.14 to dip and wash his right and left hand fingers in the solution and colour of the solution has not been changed. But whereas in Ex.P.1/REport, it was specifically mentioned that in item Nos.4 and 5, the colour of the solution is turbid liquid with pink tint which shows that the material objects sent to the Forensic Department is doubtful. That factum has not been considered by the Sanctioning Authority/P.W.3. Further, P.W.3 in his cross examination admitted that when an anonymous application on tax evasion has been received, only the Additional Commissioner of Income Tax is the competent person to order for enquiry. So, the appellants/A1 and A2 are not competent person to pass an order in the petition/Ex.P.24. That factum has also not been considered by the Sanctioning Authority. In such circumstances, I am of the view that P.W.3 has not applied his mind while according sanction for prosecution. So the sanction itself is invalid.

Whether the complaint is admissible?

12.This Court has to decide whether xerox copy of Ex.P.2/complaint is an admissible evidence. It is the duty of the prosecution to produce the original document in the Court in case of letting secondary evidence and they have to fulfill the condition imposed under Section 65 of the Indian Evidence Act. It is appropriate to incorporate Section 65 of the Indian Evidence Act, which reads as follows:

65.Cases in which secondary evidence relating to documents may be given: - Secondary evidence may be given of the existence, condition, or contents of a document in the following cases: -

(a)When the original is shown or appears to be in the possession or power - of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b)When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c)When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d)When the original is of such a nature as not to be easily movable;

(e)When the original is a public document with the meaning of section 74;

(f)When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence;

(g)When the original consists of numerous accounts or other documents which cannot conveniently be examined in court and the fact to be proved is the general result of the whole collection.

In case (a), (c) and (d), any secondary evidence of the contents of the documents is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

13.The learned counsel appearing for the appellants would submit that on perusal on Ex.P.25, wherein the documents were sent to the Superintendent of Police, Chennai and in the covering letter, it was mentioned as 'forwarding of complaint received from Smt.M.Vasanthi w/o.Murugesan for order and reply has been received on 11.09.2008 and it was stated as " Inspector Shri.Kalaimani, Please register a regular case and investigate". The said Inspector Kalaimani was examined as P.W.18. But there is no evidence to show that it has been sent by Fax because Transmission Report has not been filed before this Court. So, it is also fatal to the case of the prosecution.

14.The learned counsel appearing for the appellants would submit that it is the duty of the Investigating Officer before registering a case to make an enquiry about the genuinity of the complaint. But here, as per the evidence of P.W.3, the appellants have rendered meritorious service and that has been substantiated by the documents, much prior to the incident. There is no iota of evidence before the Court that before registering the case he made an enquiry in respect of genuinity of the complaint. It is also fatal to the case of the prosecution.

Whether the ingredients of Section 120(b) IPC made out?

15.Even though the complaint/Ex.P.2 is not an admissible evidence, a bare reading of the complaint itself shows that there is no meeting of mind and there is no conspiracy because in Ex.P.2 itself it was stated that on 10.09.2008 P.W.2 gone there and met A1 and she has stated that A1 demanded Rs.25,000/- for not taking steps. To given complaint against A1, she went to A2 and intimated the fact that A1 has demanded money and at that time, A2 also demanded Rs.25,000/-, which shows that there is no meeting of mind. That complaint has been corroborated by P.W.2 in her cross examination. In such circumstances, the evidence of P.W.2 shows that the ingredients of Section 120(b) IPC has not been made out. Hence, I am of the view that there is iota of evidence before this Court to show that both A1 and A2 conspired and to execute the same, they demanded Rs.25,000/- each. Hence, the ingredients of Section 120(b) IPC has not been proved by the prosecution beyond all reasonable doubt.

Demand of illegal gratification by the appellants

16.The case of P.W.2 is that on 10.09.2008 when she met A1, he demanded Rs.25,000/- and hence, she met A2 and intimate the fact that A1 is demanding money for not taking action against Tax Evasion Application and at that time, A2 also alleged to have demanded Rs.25,000/-. At this juncture, it is appropriate to consider the decision relied upon by the learned Special Public Prosecutor for CBI Cases reported in 2010 (15) SCC 1, wherein it was held that a witness required by public servant to give bribe money in a trap to accused on promise of doing or forbearing any official act, held, is not an accomplice.

"14.Mr. Rai, then submits that the conviction of the appellant is not fit to be sustained only on the evidence of the contractor without any corroboration. He submits that the contractor is an accomplice and, therefore, before sustaining the appellant's conviction it is essential that his evidence is corroborated by evidence of other witnesses. Reference has been made in this connection to a decision of this Court in the case

of Panalal Damodar Rathi vs. State of Maharashtra, (1979) 4 SCC 10 526 and which attention has been drawn to paragraph 9 thereof which reads as follows:

"9. It will be seen that the version of the complainant that the appellant asked the complainant whether he had brought the money and that the complainant told him that he had and that the appellant asked him to pay the money to the second accused is not spoken to by the panch witness PW 3. According to panch witness on the complainant asking the appellant whether his work will be achieved, the appellant assured him in the affirmative and the appellant told the complainant what was to be given to the second accused. It is significant that PW 3 does not mention about the appellant asking the complainant whether he had brought the money and on the complainant replying in the affirmative asking the complainant to pay the money to the second accused. Omission by PW 3 to refer to any mention of money by the appellant would show that there is no corroboration of testimony of the complainant regarding the demand for the money by the appellant. On this crucial aspect, therefore, it has to be found that the version of the complainant is not corroborated and, therefore, the evidence of the complainant on this aspect cannot be relied on."

15. Yet another decision on which reliance is placed is the decision of this Court in the case of Meena (Smt) W/O Balwant Hemke v. State of Maharashtra, (2000) 5 SCC 21 in which it held as follows:

"The corroboration essential in a case like this for what actually transpired at the time of the alleged occurrence and acceptance of bribe is very much wanting in this case. Even the other panch witness, PW 5 categorically admitted that even as the Inspector of Police, PW 6 arrived, the appellant gave the same version that PW 1 tried to force into her 11 hands the currency note which she turned down by pushing it away, and his evidence also does not lend credibility to the case of the prosecution. The contradictory version of PW 1 of the very incident when earlier examined in departmental proceedings renders his testimony in this case untrustworthy. PW 3, the Head Copyist, seems to be the brain behind all this and that PW 1 as well as Jagdish Bokade appear to be working as a group in this affair and despite the blunt denial by PW 3, his closeness to PW 1 and Jagdish Bokade stands well

substantiated. All these relevant aspects of the case seem to have been completely overlooked by the courts below."

16. We do not find any substance in the submission of Mr. Rai. The word accomplice has not been defined under the Evidence Act and therefore presumed to have been used in the ordinary sense. A person concerned in the commission of crime, a partner in crime and associate in guilt is an accomplice. He takes part in the crime and is privy to the criminal intent. In our opinion a witness forced to pay on promise of doing or forbearing to do any official act by a public servant, is not a partner in crime and associate in guilt and therefore can not be said to be accomplice. It has long been rule of practice, which has become equivalent to rule of law, that the evidence of an accomplice is admissible but to be acted upon, ordinarily requires corroboration. Contractor who gave bribe, therefore, can not be said to an accomplice as the same was extorted 12 from him.

17. Reference in this connection can be made to a decision of this Court in the case of Dalpat Singh and another v. State of Rajasthan, AIR 1969 SC 17, in which it has been held as follows:

"We are unable to accept the contention of the learned counsel for the appellants that PWs 1,2,3,4 and 17 and other prosecution witnesses to whose evidence we shall presently refer, should be considered as accomplices and therefore their evidence is required to be corroborated in material particulars before being accepted. On the proved facts, even those who gave illegal gratification to the appellants cannot be considered as accomplices as the same was extorted from them. Though PWs 1,2,4 and 17 can be considered as interested witnesses as regards their evidence relating to trap, as a matter of law, it is not correct to say that their evidence cannot be accepted without corroboration, see State of Bihar v. Basawan Singh 1959 SCR 195 = (AIR 1958 SC 500)

18. Further corroboration of evidence of a witness is required when his evidence is not wholly reliable. On appreciation of evidence, witnesses can be broadly categorized in three categories viz., unreliable, partly reliable and wholly reliable. In case of a partly reliable witness, the court seeks corroboration

in material particulars from other evidence. However in a case in which a witness is wholly reliable, no corroboration is necessary. Seeking corroboration in all circumstance of the evidence of a witness forced to give bribe may lead to absurd result. Bribe is not taken in public view and, therefore, there may not be any person who could see the giving and taking of bribe. As in the present case, a shadow witness did accompany the contractor but the appellant did not allow him to be present in the chamber. Acceptance of this submission in abstract will encourage the bribe taker to receive illegal gratification in privacy and then insist for corroboration in case of prosecution. Law can not countenance such situation."

So, I am of the view that P.W.2 and P.W.5 are not an accomplice.

17. Now, this Court has to decide whether the evidence of P.W.2 and P.W.5 are reliable. It is well settled dictum of the Apex Court that there are three types of witnesses, first one is wholly reliable; second one is partly reliable; third one is wholly unreliable. In case of wholly reliable, it need not requires any corroboration. If the evidence is partly reliable, corroboration is necessary.

18. Taking into consideration the above dictum of the Hon'ble Apex Court, now this Court has to decide whether the evidence of P.W.2 and P.W.5 is wholly reliable or partly reliable or whether it needs any corroboration to decide? But admittedly complaint has been given by P.W.2 and at the time of second demand, the amount has been tendered by P.W.5. Considering the evidence of P.W.2 and P.W.4, there is contradiction in respect of the vital fact. The learned counsel appearing for the appellant has forcefully argued that there is no evidence to show that P.W.2 and P.W.5 have met appellants on 10.09.2008 because they have not filed visitors' register. It is pertinent to note that P.W.12/Dhandapani, Superintendent in Income Tax Department, Coimbatore in his cross examination, he fairly conceded that they are maintaining visitors' register. But no reason has been assigned by the prosecution why visitors' register has not been seized and why it was not produced before this Court and non-filing of the visitors' register would create doubt in the mind of the Court that on 10.09.2008 whether P.W.2 and P.W.5 have met A1 and A2 in the office. P.W.11/K.Muthusamy, in his evidence has stated that on 10.09.2008 A2 came to the office only at 2.00 p.m but whereas in the complaint P.W.2 has not stated that at what time she met A1 and A2. In such circumstances, the non-production of visitors' register is fatal to the case of the prosecution. So, the prosecution has failed to prove that on 10.09.2008 P.W.2 and P.W.5 met A1 and A2 in the office. As already stated there is

contradiction between the evidence of P.W.2 and P.W.4. Furthermore, considering the complaint and chief examination of P.W.2 itself is sufficient to discard the evidence of P.W.2 since there is contradiction between the complaint as well as the chief examination of P.W.2 and P.W.4 in respect of availability of P.W.2 in her house and treatment taken by P.W.4. P.W.2 in her cross has stated that she has not paid the Income Tax for the income received from the house property. In such circumstances, I am of the view that the evidence of P.W.2 is not reliable. Furthermore, it is pertinent to note that the defence document has probablised his case because the the appellant/A1 has taken action in Ex.P.15, wherein it was stated that on 25.08.2008 itself it was stated as " please see the enquiry report as directed by the ITO, Ward I, Coimbatore after causing necessary enquiry about the case in submitted" which shows that much prior to the alleged demand on 25.08.2008 itself action has been taken on the application, summons has been ordered on 25.08.2008 and summons put up on 26.08.2008. So, once the action has been taken with a view to take vengeance against the appellants, P.W.2 along with P.W.5, who is the brother-in-law of P.W.2 gave complaint only to escape from the clutches of law. Both in the complaint and in the oral evidence, P.W.2 has stated that on 10.09.2008 she met the appellants and at that time, they demanded money but had not mentioned the time of alleged demand. Considering the same, I am of the view that the prosecution has miserably failed to prove the first demand on 10.09.2008.

19.He relied upon the decision reported in 1990 SCC (Crl.) 604 and submit that without corroborating the evidence of testimony of the complaint, no conviction can be imposed. It is appropriate to incorporate the relevant paragraph which reads as follows:

"4.The sum and substance of the above reasoning go to show that there is no acceptable and clinching evidence proving that there was a demand of bribe and that the respondent accepted the amount in question as a motive or reward for doing an official act or showing a favour to Ambar Prasad in exercise of his official function."

Here also there is no evidence for demand on 10.09.2008 and 11.09.2008 and acceptance and recovery from A2.

20.Now this Court has to decide whether the second demand has been made? Admittedly during the trap proceeding only P.W.5 alone has been alleged to hand over the amount to A1 and A2 on demand. P.W.8/Chandrasekar, in his evidence, he has stated that the amount has been seized only from the left hand draw in a white window envelope. But phenolphthalein test has been conducted and no colour has been changed and that has been mentioned in Recovery mahazar

also. But whereas in Ex.P.1 in item Nos.4 and 5 it was stated as turbid liquid with pink tint which shows that the material objects which was collected on 11.09.2008, i.e. Hand wash of A2 has not been sent to the Forensic Department but the Forensic Department has given a report that it is positive. So, to prove the second demand, except Ipse Dixit P.W.5, who is the brother-in-law of P.W.2, there is no other evidence. Since P.W.2 and P.W.5 are having enmity towards A1 and A2 since they made an enquiry and taken action against P.W.2 on the basis of anonymous petition received, they have given a complaint. So, I am of the view that the evidence of P.W.5 is not wholly reliable. Hence, there is no corroboration and so, the evidence of P.W.5 in respect of second demand is not proved in accordance with law. In respect of A2 is concerned, acceptance and recovery has not been proved by the prosecution beyond reasonable doubt.

21. In respect of A1 is concerned, even though it was stated that test has been positive and that has been sent to chemical analysis and report has been received, this Court has already held that the report is not correct. In earlier paragraph, this Court held that the evidence of P.W.5 is not wholly reliable, it requires corroboration. But, no corroborating evidence is available in this case.

22. At this juncture, it is appropriate to consider the decisions relied upon by the learned counsel appearing for the appellants.

23. In the judgment reported in 2002 (5) SCC 86, wherein it was held that if the prosecution has proved that the appellants have received illegal gratification, then only they are entitled to invoke presumption under Section 20 of P.C. Act. He further submitted that the presumption cannot be invoked for the offence under Section 13(1) (d) of P.C. Act. It is appropriate to incorporate the relevant paragraph, which reads as follows:

"9. Same is the position of statutory presumption under Section 20 of the Act and is available for the offence punishable under Section 7 or Section 11 or Clause (a) or Clause (b) of sub-section (1) of Section 13 and not for Clause (d) of sub-section (1) of Section 13."

24. He also relied upon the decision reported in AIR 1992 SC 644, and submit that non-examination of independent witness, conviction cannot be based merely on probabilities. The relevant paragraph reads as follows:

"2. We have heard learned counsel for parties. There is no independent evidence to show that the appellant demanded Rs.100/- as bribe from the complainant. The chemical solution did not inculcate

him. The money was recovered from the drawer. There is no evidence apart from the complainant to show that the money was placed in the drawer by the complainant at the asking of the appellant. Under the circumstances we agree with the learned counsel for the appellant that the conviction is based more on probabilities than on the evidence proving the guilt against him beyond reasonable doubt."

26.He also relied upon the decision reported in 2006 (1) SCC (Cr1.) 520, wherein it was held that where the accused charged for the offence under Section 13(1)(d) r/w. 13(2) of P.C. Act., Section 20 shall not attracted. It is appropriate to incorporate the relevant paragraph, which reads as follows:

"36.In this case demand of illegal gratification by the respondent has not been proved. Furthermore, Section 20 of the Act is not attracted as the respondent had been charged for commission of an offence under Section 13(1)(d) read with Section 13(2) of the Act."

27.Considering the above citation along with the facts of the present case, the appellants are not the competent person to take action against the Tax Evasion Application since already action has been taken on 25.08.2008. In such circumstances, the above citations are squarely applicable

28.In the decision reported in 1979 (4) SCC 725, it was held that mere recovery of bribe amount is not sufficient to convict in the absence of any evidence to prove the demand of bribe or to show that the appellant voluntarily accepted the money. It is appropriate to incorporate the relevant portion, which reads as follows:

"2.....In our opinion, mere recovery of money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. Moreover, the appellant in his statement under Section 342 has denied the recovery of the money and has stated that he had been falsely implicated. The High Court was wrong in holding that the appellant had admitted either the payment of money or recovery of the same as this fact is specifically denied by the appellant in his statement Under Section 342 Cr. PC Thus mere recovery by itself cannot prove the charge of the prosecution against the appellant, in the absence of any evidence to prove payment of bribe or to show that the appellant voluntarily accepted the money."

Nothing has been recovered from A2. Phenolphthalein test was not positive in respect of A2 is concerned. This Court has held that the report/Ex.P.1 from P.W.1 is not true and genuine. In view of the above citation, I am of the view that it is not a fit case for convicting the appellants/A1 and A2 only on the basis of recovery.

29.As stated supra, the following grounds are the reason for setting aside the conviction:

- a) Sanction is invalid for non-application of mind. Since sanction fails, prosecution itself fails.
- b) The non-filing of original complaint and transmission report is fatal to the case of the prosecution.
- c) The non-filing of visitors' register maintained in the office is also fatal. So, the demand on 10.09.2008 has not been proved.
- d) The evidence of P.W.2, P.W.4 and P.W.5 are contradict with each and their evidence are not reliable.
- e) The second demand has not been proved.
- f) Since no corroboration for evidence of P.W.5, acceptance and recovery has not been proved in respect of A2.
- g) The material objects sent to Forensic Department also has not been proved since as per evidence of P.W.8/Chandrasekan and P.W.14/Ponalagan, no colour has been changed at the time of phenolphthalein test with A2 but whereas the material received by the Forensic Department, it was stated that the item Nos.4 and 5 colour of the solution is turbid liquid with pink tint. So no reason has been assigned by the prosecution how the colour has been changed during transit.
- h) Further, already action has been taken on 25.08.2008 in Tax Evasion Petition.
- i) Neither A1 nor A2 is a competent person to take action against the Tax Evasion Petition and only P.W.15 is the competent person to take action.

30.Considering the above, I am of the view that the Trial Court has not considered the above aspects in proper perspective while imposing conviction and sentence. So, I am of the considered view that the prosecution has miserably failed to prove the guilt of the appellants/A1 and A2 for the offence under Section 7 of Prevention of Corruption Act beyond all reasonable doubt. Since Section 7 of P.C. Act has not been proved, the offence under Section 13(2) r/w 13(1)(d) of P.C. Act has not been made out. The benefit of doubt is given in favour of the appellants/accused and they are acquitted from the charges levelled against them. Therefore, the Judgment of conviction and sentence passed by the Trial Court is hereby set aside.

31.In fine,

- The Criminal Appeals are allowed by setting aside the judgment of conviction and sentence dated 27.06.2013 made in C.C.No.9 of 2008 on the file of the learned II Additional District Judge/Special Judge (CBI Cases), Coimbatore.
- The appellants/accused are acquitted from the charges levelled against them and they are set free.
- The fine amount paid by the accused is ordered to be refunded to him.
- Bail bond executed by the appellants/accused shall stand cancelled.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

cse

To

1.The Inspector of Police
SPE/CBI/ACB, Chennai.

2.II Additional District Judge/Special Judge (CBI Cases), Coimbatore.

3.The Spl.Public Prosecutor
High Court, Madras.

4.The Record Keeper
Criminal Section, High Court, Madras.

1 cc to Mr.K.Srinivasan ,Advocate, SR.No.14748

3 cc to Mr.V.Sivakumar ,Advocate, SR.No.15577

1 cc to Mr.R.Karthikeyan ,Advocate, SR.No.14819

Crl.A.Nos.456 and 464 of 2013

sai(co)

pmk.27.3.2015

WEB COPY