In the High Court of Punjab and Haryana at Chandigarh

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(1) Criminal Appeal No.S-769-SB of 2011

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Date of decision:18.11.2015

Parmod Kumar Mukhija

...Appellant

v.

State of Haryana

...Respondent

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(2) Criminal Appeal No.S-777-SB of 2011

.....

Narender Singh

...Appellant

v.

State of Haryana

...Respondent

....

Coram: Hon'ble Mr. Justice Inderjit Singh

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Present: Mr. P.S. Hundal, Senior Advocate with Mr. Dinesh Trehan, Advocate for the appellants.

Mr. Brijesh Sharma, Assistant Advocate General, Haryana for the respondent-State.

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Inderjit Singh, J.

This judgment will dispose of above mentioned two criminal appeals filed by appellants Parmod Kumar Mukhija and Narender Singh as these arise from the same judgment of conviction and order of sentence dated 11.3.2011 passed by learned Special Judge, Karnal, whereby they have been held guilty and convicted for the offences under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as `the Act'). The appellants have been sentenced to undergo rigorous imprisonment for two years each and to pay a fine of ₹10,000/- each and in default of payment of fine to further undergo rigorous imprisonment for one year each for the offences under Sections 7 and 13(1)(d) read with Section 13(2) of the Act. Both the sentences have, however, been ordered to run concurrently.

The brief facts of the prosecution case are that the FIR in the present case was registered on the information of Ajay Saroha for demanding and accepting ₹20,000/- from him Saroha for verifying and passing of his work of 70 LIG houses by corrupt or illegal means other than their legal remuneration for which they were not legally entitled. It is the version of the prosecution that on 22.8.2007, complainant-Ajay Saroha along with Naveen Kumar came to the office of Director Vigilance and presented a complaint againt both the accused, which was marked to DSP, Karnail Chand by the then Inspector General of Police, wherein it was alleged that he is resident of Village Jagdishpur, District Sonepat and he took contract for constructing 70 LIG flats of Housing Board, Haryana in Sectors 4-5, which were being constructed under the supervision of P.K. Mukhija, SDO and Narender Singh, JE and after passing the work by both these persons, payment is made. It is further alleged that the work of the building of flats had been completed and the payment of amount of ₹4 Lacs had been stopped and both these persons would not release the cheques till the bribe of ₹25,000/- each was not given. It is further alleged that on 21.8.2007, the complainant received a mobile call on his Mobile No.92155-82502, which was in the name of his relative Maman Chand, which belongs to accused P.K. Mukhija, to the effect that he would release the payment only after clearing his account of illegal gratification; failing which he would raise objection on the payment and demand of illegal gratification of ₹25,000/- was made by SDO and JE. He made false promise to pay ₹10,000/- each and he had brought the said amount. FIR was registered on the said complaint. Then a trap party was constituted. SDM, Karnal, Shri R.K. Singh was also joined in the raiding party. Naveen Kumar was appointed as shadow witness. Raid was conducted after making demonstration etc. Then the complainant handed over ₹10,000/- each to both the accused. On receiving signal from the shadow witness, the raiding party went inside. From personal search of accused P.K. Mukhija, tainted currency notes were recovered from his right hand. Similarly, the currency notes were recovered from the shirt of Narender Singh. Necessary proceedings were completed. After completion of investigation, the challan was presented in the Court.

On presentation of challan, the trial Court finding prima facie case against the accused, framed charges for the offences under Sections 7 and 13(1)(d) read with Section 13(2) of the Act, to which the accused pleaded not guilty and claimed trial.

In support of its case, the prosecution examined PW-1 Ajay

Saroha-complainant, who did not support the prosecution version and even denied the application Ex.P.1 written by him and denied his signatures also. He denied all the proceedings of raid. He was got declared hostile, however, he admitted making of statement under Section 164 Cr.P.C. before the learned Chief Judicial Magistrate. PW-2 Naveen Kumar is shadow witness. He also failed to support the prosecution case. He denied having made any statement Ex.P.12 to the Police. He was also declared hostile. PW-3 Inspector Sher Singh, SVB Sonepat is a formal witness, who prepared report under Section 173 Cr.P.C. when he was posted as such at Rohtak. PW-4 HC Vir Shakti Singh deposed regarding preparing the scaled site plan Ex.P.13. PW-5 ASI Siri Krishan is a formal witness, who tendered in evidence his affidavit Ex.P.14. PW-6 Sohan Lal Goyal, Chief Revenue Officer, Housing board, Haryana mainly proved the posting order of P.K. Mukhija and also regarding sanction of the prosecution of both the accused. PW-7 Constable Udham Singh mainly deposed regarding taking the `Ruqa' to the police station. PW-8 Avinash Yadav, Head Clerk, Housing Board, Haryana mainly brought the summoned record. PW-9 Retired Inspector Om Parkash deposed regarding the FIR etc. PW-10 Retired DSP Karnail Chand is the Investigating Officer, who deposed regarding conducting investigation in this case. PW-11 Shri R.K. Singh, HCS, SDM-cum-Additional Collector deposed regarding the proceedings of the trap.

At the close of the prosecution evidence, the accused were examined under Section 313 Cr.P.C. and were confronted with the evidence of the prosecution, but they denied the correctness of the evidence and pleaded themselves as innocent. Accused P.K. Mukhija further denied the alleged recovery from him as well as from the possession of his co-accused Narender Singh. He had already recommended to XEN, Housing Board to release the payment of complainant Ajay Saroha on 13.8.2007. Accused Narender Singh had also taken the same stand.

The accused in defence examined DW-1 Manpreet Singh, Assistant Manager, UTI Bank, Karnal, who brought the summoned record. DW-2 Partap Saini, Accountant, Housing Board, Haryana, Karnal, brought the summoned record and deposed and proved the measurement book Ex.D.1. He also deposed that accused Narender Singh prepared and submitted the bill to accused P.K. Mukhija for release of payment on 12.8.2007. XEN Shri C.R. Mittal was the competent authority to issue the cheque in favour of the complainant.

After going through the evidence on record, the learned trial Court, vide its impugned judgment and order, convicted and sentenced the accused-appellants for the offences as mentioned above.

At the time of arguments, learned senior counsel for the appellant argued that the prosecution has failed to prove its case by leading cogent evidence beyond a reasonable shadow of doubt. He argued that neither the demand nor the acceptance of the bribe money has been proved. He further argued that the statement recorded under Section 164 Cr.P.C. cannot be used for conviction. He also argued that the learned Chief Judicial Magistrate, who recorded the statement has not been examined. He further argued that even the PWs are discrepant on material points. Both the

PWs i.e. recovery witness SDM and the Investigating Officer say that they had gone for raid to Sector 6, Karnal, whereas DW-1 says that they have no office in Sector 6, Karnal. Learned senior counsel for the appellants further argued that PW-10 has no where stated as to where they had gone in Sector 6 also at the time of raid. He further argued that there is Vigilance Office at Karnal etc., but the complainant had not come to Karnal, but came to office of Inspector General of Police, Panchkula. As, he argued that as the complainant and shadow witnesses both have turned hostile, therefore, the demand and acceptance of the bribe money has not been proved, hence, presumption under Section 20 of the Act will not apply in the present case.

On the other hand, learned Assistant Advocate General, Haryana appearing for the respondent-State argued that the bribe money has been recovered on the spot from the accused, therefore, presumption under Section 20 of the Act will apply in the present case and it is for the accused-appellants to rebut that presumption by leading cogent evidence.

I have heard learned senior counsel for the appellants and learned Assistant Advocate General, Haryana appearing for the respondent-State and have gone through the evidence on record minutely and carefully.

From the record, I find that firstly, complainant Ajay Saroha as well as shadow witness Naveen Kumar have turned hostile and have not supported the prosecution version. Even the complainant has denied his signatures and hand-writing on the application Ex.P.1. There is no evidence on the record to prove this application Ex.P.1. Further, as both these PWs have turned hostile and have not supported the prosecution version, therefore, the demand of bribe money and acceptance of same has not been proved by the prosecution.

Learned senior counsel for the appellants placed reliance on the judgment of the Hon'ble Supreme Court in C. Sukumaran v. State of Kerala, 2015(2) R.C.R. (Cr.) 159, wherein it was held that in the absence of demand of gratification, the charge under Section 13(1)(d) read with Section 13(2) of the Act is wholly unsustainable in law and conviction under Section 13 (1)(d) read with Section 13(2) of the Act is not justified and set aside. I have gone through the law laid down in this judgment, which fully applies to the facts of the present case.

Learned senior counsel for the appellants also placed reliance on the judgment of the Hon'ble Supreme Court in M.R. Purushotham v. State of Karnataka, 2015 Cri.L.J. 72, in which it was held that mere possession and recovery of the currency notes from the accused without of demand will not bring home the offence under Section 13(1)(d) of the Act. In this judgment, the Hon'ble Supreme Court has held as under:-

> "6. In such type of cases the prosecution has to prove that there was a demand and there was acceptance of illegal gratification by the accused. As already seen the complainant PW1 Ramesh did not support the prosecution case insofar as demand by the accused is concerned. No other evidence was adduced by the prosecution to prove the demand made by the accused with the complainant. In this context the recent decision of a three Judge bench of this Court in ***B. Jayaraj* vs. *State of Andhra Pradesh,***

reported in 2014(4) Scale 81 is relevant and it is held as follows:

> "8. In the present case, the complainant did not support the prosecution case in so far as demand by the accused is concerned. The prosecution has not examined any other witness, present at the time when the money was allegedly handed over to the accused by the complainant, to prove that the same was pursuant to any demand made by the accused. When the complainant himself had disowned what he had stated in the initial complaint (Exbt.P-11) before LW-9, and there is no other evidence to prove that the accused had made any demand, the evidence of PW-1 and the contents of Exhibit P-11 cannot be relied upon to come to the conclusion that the above material furnishes proof of the demand allegedly made by the accused. We are, therefore, inclined to hold that the learned trial court as well as the High Court was not correct in holding the demand alleged to be made by the accused as proved. The only other material available is the recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by the accused himself. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under

> Section 7. The above also will be conclusive in so far as the offence under Section 13(1)(d)(i)(ii) is concerned as in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established."
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> The above decision is squarely applicable to the facts of the present case. When PW1 Ramesh himself had disowned what he has stated in his initial complaint in Exh.P1 before PW4 Inspector Santosh Kumar and there is no other evidence to prove that the accused had made any demand, the evidence of PW3 Kumaraswamy and the contents of Exh.P1 complaint cannot be relied upon to conclude that the said material furnishes proof of demand allegedly made by the accused. The High Court was not correct in holding the demand alleged to be made by the accused as proved. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 13(1)(d) of the Act and the conviction and sentence imposed on the appellant are liable to be set aside."

I have gone through the law laid down in this judgment, which fully applies in the present case.

Learned senior counsel for the appellants also placed reliance on the judgment of the Hon'ble Supreme Court in Utpal Dass and another v. State of West Bengal, 2010 Cri.L.J. 2867, wherein it was held that statement under Section 164 Cr.P.C. can never be used as substantive evidence of truth of the facts but may be used for contradictions and corroboration of a witness who made it. It is held that the statement made under Section 164 Cr.P.C. can be used to cross-examine the maker of it and the result may be to show that the evidence of the witness is false. It can be used to impeach the credibility of the prosecution witness. I have gone through the law laid down in this judgment, which fully applies in the present case as the complainant and shadow witness have totally turned hostile. Therefore, on the basis of statement under Section 164 Cr.P.C., the accused cannot be convicted. In no way, the statement recorded under Section 164 Cr.P.C. can be held as a substantive piece of evidence. The statement recorded under Section 164 Cr.P.C. can only be used for contradicting the witness in the cross-examination or for corroboration purposes. As the witness has totally disowned the statement and has not supported the prosecution version, therefore, on the basis of this statement under Section 164 Cr.P.C. he cannot be convicted.

Learned senior counsel for the appellants also placed reliance on the judgment of the Hon'ble Supreme Court in B. Jayaraj v. State of A.P., 2014 (4) R.C.R. (Cr.) 410 (three Judge Bench), in which it was held as under:

> "7. In so far as the offence under Section 7 is concerned, it is a settled position in law that demand of illegal gratification is

sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down in several judgments of this Court. By way of illustration reference may be made to the decision in **C.M. Sharma Vs. State of A.P.**, 2011(1) R.C.R. (Criminal) 183 and **C.M. Girish Babu Vs. C.B.I.,**2009 (2) R.C.R. (Criminal) 134.

8. In the present case, the complainant did not support the prosecution case in so far as demand by the accused is concerned. The prosecution has not examined any other witness, present at the time when the money was allegedly handed over to the accused by the complainant, to prove that the same was pursuant to any demand made by the accused. When the complainant himself had disowned what he had stated in the initial complaint (Exbt.P-11) before LW-9, and there is no other evidence to prove that the accused had made any demand, the evidence of PW-1 and the contents of Exhibit P-11 cannot be relied upon to come to the conclusion that the above material furnishes proof of the demand allegedly made by the accused. We are, therefore, inclined to hold that the learned trial court as well as the High Court was not correct in holding the demand alleged to be made by the accused as

proved. The only other material available is the recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by the accused himself. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7. The above also will be conclusive in so far as the offence under Section 13(1)(d)(i)(ii) is concerned as in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established.

9. In so far as the presumption permissible to be drawn under Section 20 of the Act is concerned, such presumption can only be in respect of the offence under Section 7 and not the offences under Section 13(1)(d)(i)(ii) of the Act. In any event, it is only on proof of acceptance of illegal gratification that presumption can be drawn under Section 20 of the Act that such gratification was received for doing or forbearing to do any official act. Proof of acceptance of illegal gratification can follow only if there is proof of demand. As the same is lacking in the present case the primary facts on the basis of which the legal presumption under Section 20 can be drawn are wholly absent."

I have gone through the law laid down in this judgment, which fully applies to the facts of the present case. Therefore, in the present case, the prosecution has failed to prove the demand as well as acceptance of bribe money. Therefore, the presumption under Section 20 of the Act can not be applied.

Next, I find that it has been duly proved by DW-1 that there is no office of this Department in Sector 6, but PW-11 and PW-10 say that they had gone to Sector 6, Karnal, which also creates doubt in the prosecution version. There is also no explanation when there is office of the Vigilance Bureau at Karnal, why the complainant and shadow witness came to the office of Inspector General of Police, Panchkula.

Keeping in view the above discussion, I find that the prosecution has failed to prove its case by leading cogent evidence and beyond any reasonable doubt. The benefit of doubt always go to the accused-appellants. Therefore, by giving benefit of doubt to the appellants, they are acquitted of the charges as framed against them.

In view of above discussion, I find merit in the appeals and the same are allowed. The impugned judgment of conviction and order of sentence recorded by the learned trial Court are set aside and the appellants are acquitted of the charges for which they were convicted. Since, the appellants are on bail, their bail and surety bonds stand discharged.

November 18, 2015. **(Inderjit Singh)**
Judge

hsp

NOTE: Whether to be referred to the Reporter or not:Yes