

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment pronounced on: 19th August, 2015

+ **Crl. A. No.159/2005**

S.K. SAINI & ANR Appellants
Through Mr.Sunil K. Mittal, Adv. with
Mr.Anshul Mittal & Ms.Abhilasha
Singh, Advs.

versus

C.B.I. Respondent
Through Mr.R.V.Sinha, Standing Counsel
with Mr.A.S.Singh, Adv.

**CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

1. The present appeal has been filed by the appellants under Section 374 Cr.P.C. for setting aside the impugned judgment dated 14th February, 2005 and an order dated 15th February, 2005 passed by Special Judge, Delhi in CC No. 23/2001 whereby the appellants were convicted for offences under Section 120-B IPC read with Section 7 and 13(2) read with 13(1) (d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as the "PC"). They were sentenced to undergo :-

- i) Rigorous imprisonment for six months and to pay fine of Rs.1,000/- each for the offence punishable under Section 120-B IPC read with Section 7 and 13(2) read with 13(1)(d) of

the PC Act. In default of payment of fine, they shall undergo simple imprisonment for one month.

- ii) Rigorous imprisonment for two years and to pay a fine of Rs.10,000/- each for the offence punishable under Section 7 of the PC Act. In default of payment of fine, they shall undergo simple imprisonment for three months.
- iii) Rigorous imprisonment for three years and to pay fine of Rs.10,000/- each for the offence punishable under Section 13(2) read with 13(1)(d) of the PC Act. In default of payment of fine, they shall undergo simple imprisonment for three months.

2. It was observed by the trial court that all the substantive sentences to run concurrently and benefit of period of detention already undergone be given. Fine stood paid.

3. The appeal was admitted on 23rd February, 2005. The sentence of the appellants was suspended by order dated 4th March, 2005.

4. The case of the prosecution is recorded by the trial Court. The details of the same are that the case was registered by the CBI against the accused persons on the basis of written complaint of Sh. C.K. Dhingra wherein he alleged that on 1st May, 2001 appellant No.1 visited the premises of the complainant i.e. L-13, Kalkaji, New Delhi and threatened him to seal the said building in which the construction work was going on. The appellant No.1 directed the complainant to stop the construction and threatened him if the amount of Rs.3 lacs is not paid to him, he will not allow the construction and in case of non-payment, he will demolish the building. On the request of complainant

that it is difficult for him to arrange Rs.3 lacs, appellant No.1 directed him to pay Rs.50,000/- by 3.00 pm on 2nd May, 2001. The appellant No.1 further said that he would come to the showroom of complainant to collect the first installment of bribe and further directed him to pay the remaining amount of Rs.1 lac in two or three days and the balance amount of Rs.50,000/- after 15 days. The complainant did not want to pay the bribe and wanted legal action against appellant No.1. On 2nd May, 2001 a case RC No. 35(A)/2001 was registered which was entrusted to Inspector A.K. Malik for investigation who procured presence of two independent witnesses namely, Sh. Mahipal Singh Panwar and Sh. Ram Sharma, both LDC from DDA, Vikas Sadan. A trap party consisting of Inspector U.K. Goswami, Inspector M.M. Ansari, SI Prem Nath was constituted under the leadership of Inspector A.K. Malik. The complaint was read over to the witnesses who got themselves satisfied about the genuineness of the complaint. The complainant also produced Rs.50,000/- in the form of 100 GC notes of Rs.500/- each, numbers of which were noted down in the handing over memo. The GC notes were smeared with phenolphthalein powder and practical demonstration was given to show the reaction between phenolphthalein and sodium carbonate with the help of Sh. Ram Sharma. After demonstration, the solution was destroyed. The powder treated GC notes were kept in the upper left side pocket of complainant and he was directed to handover the said GC notes to appellant No.1 on his specific demand or to any other person on his direction. Sh. Mahipal Singh was directed to act as a shadow witness and to remain as close as possible to the

complainant and to overhear the conversation and to see the transaction of bribe. He was also directed to give signal by scratching his head with both his hands after the transaction of bribe amount is completed. The pre-trap proceedings were incorporated in the handling over memo. The formal voice of both the witnesses were taken on an audio cassette after ensuring that the cassette is blank. The operation of the recording instrument and transmitter was explained to all by SI Prem Nath. The transmitter along with recorder was given to the complainant with the direction to switch on the same before starting conversation with the accused.

4.1. The trap team members reached near the office of the complainant i.e. K1/46, C.R. Park, New Delhi at about 3.00 pm and the complainant and shadow witness took their position in the office of the complainant and waited for appellant No.1 to come. At about 3.15 pm, three persons who were later identified as appellant No.1, appellant No.2 and Shakti Veil came at the spot in a Maruti Zen bearing No. DL CN 4040 and sat around a table where complainant and shadow witness were already sitting in the room. Sh. S.K. Saini asked the complainant that he was constructing commercial building and installing six shutters in the building. Sh. Saini demanded Rs.50,000/- for each shutter and also for stopping the construction at L-13, Kalkaji, New Delhi. The complainant requested appellant No.1 that it was huge amount and he could not make payment of the same at once, at which appellant No.1 agreed to accept the bribe amount in installments and the same was written by him on a file cover in some abbreviated form. The appellant No.1 asked the complainant to pay

Rs.1 lac as first installment but on the request of complainant, he agreed to accept Rs.50,000/- as first installment and the same was accepted by appellant No.2 with his right hand from the complainant on the direction of appellant No.1 and kept the same by handling with his both hands inside his left side of the shirt. On receipt of pre-appointed signal at 3.30 pm from Sh. Mahipal, trap team rushed towards the spot and accused persons were apprehended by Inspector U.K. Goswami, M.M. Ansari and SI Prem Nath. Inspector A.K Malik disclosed identity of trap team including witnesses to the accused persons and challenged them as to whether they had demanded and accepted bribe amount from the complainant. At this, they all kept mum and got perplexed. On being inquired, Sh. Mahipal informed about the demand and acceptance of bribe. The version of Sh. Mahipal was corroborated by complainant.

4.2 Witness Sh. Ram Sharma recovered the bribe amount from the shirt of appellant No.2 and found the amount to be Rs.50,000/-. On comparison, it was found that the numbers of recovered GC notes were tallying with the numbers mentioned in the handing over memo. Thereafter right hand wash, left hand wash and wash of shirt pocket of the accused/ appellant No.2 was taken separately and all the solutions turned pink which were transferred in separate glass bottles. Bottles were sealed with the help of cloth wrappers and paper slips marked as RHW, LHW and ISPBSP were pasted on the bottles which were signed by both the witnesses. The conversation held between the complainant and appellant No.1 was recorded and heard at the spot which confirmed the above said demand of bribe by

appellant No.1 The cassette was sealed with CBI and both the witnesses signed on the cloth piece wrapped on the cassette. A rough site plan was prepared which was also signed by the witnesses. The recovered bribe amount, three sealed bottles, sealed cassette, shirt worn by appellant No.2 at the time of trap and a file on which appellant No.1 wrote some figures were taken in police possession. All the post trap proceedings were recorded in the recovery-cum-search memo which concluded at 8.10 pm.

5. During investigation, it was found that property No. L-13, Kalkaji, New Delhi was booked by appellant No.1 for violation of sanctioned building plan from basement to first floor and for this purpose an FIR was registered by appellant No.1 on 27th December, 2000. After observing all formalities and permission of Sh. R.K. Jain, Assistant Engineer, Demolition order of this building was issued on 5th January, 2001. Further on 15th March, 2001 another FIR was issued by appellant No.1 for violation of sanctioned building plan of second and third floor of the said building. After observing official formalities, Sh. Rakesh Kumar, AE issued demolition order on 22nd March, 2001 in regard to the said building, however, the same was not executed by the day of trap. During investigation it was been revealed that it was very well in the knowledge of appellant No.2 and Shakti Veil that property No. L-13, Kalkaji, New Delhi of Sh. C.K. Dhingra for which they in conspiracy with appellant No.1 were demanding and accepting bribe, had already been booked for deviating sanctioned building plan.

The bottles containing hand washes and shirt wash of the appellant No.2 were sent to CFSL for expert opinion and the expert vide his report dated 31st May, 2001 gave positive test for presence of phenolphthalein and sodium carbonate in the said solutions. The cassettes containing questioned and specimen voice of appellant No.1 were also sent to CFSL for comparison and to prepare transcription of the questioned voice. The expert vide his report No. CFSL-2001/E 257 dated 7th September, 2001 and 17th May, 2002 opined that the questioned voice and specimen voice are similar. After obtaining the sanction for prosecution of above named accused persons from the competent authority, charge sheet was filed in the Court.

6. The copies under Section 207 Cr.P.C. were supplied to the accused. After hearing the CBI and the accused persons on the point of charge, vide order dated 3rd February, 2002 accused Shakti Veil was discharged and a charge for the offence punishable under Section 120-B IPC read with Section 13(2) read with 13(l)(d) of P.C. Act was framed against appellant No.1 and appellant No.2. The appellant Nos. 1 and 2 were also separately charged for the offences under Section 7 and 13(2) read with 13(l)(d) of PC Act on 25th April, 2003 to which they pleaded not guilty and claimed trial.

7. Thereafter following prosecution witnesses were examined:

- i. PW-1 Sh. KS Chhabra, Sr. Scientific Officer, Grade-I cum Asstt. Chemical Examiner, CFSL. (Scientific Witness).
- ii. PW-2 Sh. Mahipal Singh, LDC, DDA, Vikas Sadan, (Shadow Witness).

- iii. PW-3 Sh. Ram Sharma, LDC (at the time of offence) DDA, Vikas Sadan, DDA. (Recover Witness).
- iv. PW-4 Sh. Rakesh Kumar, A.E in Central Zone, MCD, Lajpat Nagar, Delhi. Confirmed the posting of the appellant.
- v. PW-5 Sh. K.D. Akolia, Dy. Commissioner MCD Central Zone. Accorded the Sanction under section 19 of PC Act.
- vi. PW-6 Dr. Rajinder Singh, SSO, Grade-I & Head, CFSL Delhi. For Audio Cassette.
- vii. PW-7 Sh. C.K Dhingra (builder Constructor), the complainant.
- viii. PW-8 Insp. Surinder Malik, Insp. ACB/CBI. the IO of the case.
- ix. PW-9 Insp. AK Malik, Insp. (TLO). Trap laying officer.
PW-10 Sh. R.K. Jain, Executive Engg., MCD, Who issued demolishing notice to the complainant.

8. The appellants also led the defence evidence after their statements under Section 313 Cr.P.C. were recorded. DW-1 Sh. Shakti Veil, Beldar, (accused no. 3 earlier, who was discharged by the trial court) was examined as defence witness.

9. After considering the evidence and material available on record, the trial court in paras 47 and 48 of the impugned judgment has come to the conclusion that the appellants here are guilty under Section 120-B IPC read with Section 7 and 13(2) read with Section 13(1)(d) of the PC Act for the substantive offences and convicted them accordingly. The said judgment has been challenged by the appellants before this Court.

10. The trial court in para 36 of the impugned judgment has arrived at the conclusion after evidence that undisputedly both the panch

witnesses and complainant in this case have preferred to turn hostile leaving this Court with a situation whether the Court has to look into the entire circumstances leading to the trap of the accused persons to ascertain the truth and veracity of their testimony and to look for necessary corroboration from the statement of TLO as well the tap recorded conversation which has been somewhere referred/relied by the accused persons to prove their innocence and somewhere disputed as fabricated one recorded in the CBI office by providing written material to the complainant. Though he has been declared hostile but he has proved that the complaint Ex. PW7/A has been written by him in his own hand. The dictation part by CBI has been admitted with the condition that the facts were narrated by him. So the correctness of the facts narrated in the complaint stands proved by PW-7 Sh. C.K. Dhingra. Even otherwise a bare look on the complaint can make it clear that it has not been dictated by the DSP Mr. Joshi and it is complainant's own version in his own language.

Once it is established on record that the visit of both the accused persons was as per the time already fixed between accused No.1 and the complainant, it was for the accused persons to explain the purpose of their visit in the showroom of the complainant if it was not for accepting the bribe. There is nothing on record to suggest that they were present there as part of some official duty. The MCD record Ex.PW4/A to E-5 clearly proves that the building of the complainant had already booked for unauthorised construction and it could not be considered for regularisation.

As far as pre-trap proceedings are concerned, the trial court in para 39 of the judgment had arrived that the complainant and both the panch witnesses have admitted regarding the production of trap money by the complainant and treating the same with powder and handing over back the powder treated notes to the complainant with direction to give the same on specific demand. A tape recorder was given to the complainant to record the conversation on arrival of the accused. These steps by the CBI clearly proves that it did not want to play in the hands of complainant rather every step was taken to ensure that no innocent person is implicated by the complainant due to some personal grievance or vested interest. The closure report in D.A. case by CBI as claimed by appellant No.1, proved that CBI had conducted the investigation against the accused in fair and impartial manner. First of all it is to be seen whether the tape recorded conversation between the two i.e. accused No.1 and the complainant, the transcript of which is EX.PW6/C had been prepared on the basis of recording done at the spot or on the next day in the CBI office by giving a written script to the complainant and appellant No.1 to read the same and then recorded. In this regard the statement of the complainant fully proves that this transcript pertains to the conversation recorded at the spot and it was not prepared on the next day in the CBI office. Secondly the manner of the conversation between the complainant and the appellant No.1 and the topics of discussion could not have been foreseen by the CBI team so as to prepare a script/written material and give the same to accused No.1 and the complainant to read out loudly by turn and then record the

same. At places both are speaking simultaneously. No doubt the complainant had not identified the complete conversation referred to in the transcription but even the portions which have been identified by him to be in his own voice or in the voice of the accused are sufficient to corroborate the prosecution's case.

11. It has also been concluded that the complainant had admitted that the demand at the spot was made by both the accused persons by saying that he had to do something and accused No.2 gesticulated with his head and only then he tendered the trap money. The same is sufficient to prove the acceptance of money by both the accused persons who had visited the show room in conspiracy with each other to collect the bribe amount from the complainant. So far as the recovery part is concerned, none of the accused has disputed that the money was tendered by the complainant but the explanation given was only that the appellant No.2 pushed the complainant when he was keeping the money from the gap of two buttons in his shirt thereby the accused No.2 had tried to explain the presence of phenolphthalein powder in the washes. First of all I find it difficult to believe that a wad of Rs.50,000/- containing 100 GC notes of Rs.500/- can be kept conveniently by another person from the gap of two buttons. In that process either the button will be broken or the complainant would be unsuccessful or money would be accepted in his own hand by the person accepting and voluntarily kept in the shirt and only then presence of phenolphthalein powder on the shirt and hands could be justified and not in any other manner as has been tried to be done in the present case. So far as the tape recorded

conversation is concerned, its authenticity cannot be doubted as the conversation recorded therein is so natural that only the concerned person could have talked about in that manner using even the unprintable abusive language specially the one referred to from portion J to J. The complainant and both the panch witnesses have admitted that the tape recorder to record the conversation at the spot was used in this case.

Although the version has been changed by the panch witnesses that when it was played at the showroom there was no voice except their specimen voice and noise of traffic but that has been belied from the statement of the complainant who has not only identified the voices therein but also stated that it was recorded at the spot. Had the recording being done in CBI office on next day as claimed by accused persons, the last part of transcript especially on being challenged by TLO could not have been there. This cassette contains the voice of the appellant No.1 denying that he has accepted the bribe money and offering his search to TLO, which part has also been relied upon by the accused No.1 to prove his innocence, is sufficient to lend necessary credibility regarding the accuracy of its contents.

12. At the end, it is observed by the trial Court that despite the fact that the material witnesses turned hostile with a view to help the accused persons, they have been convicted on the basis of circumstantial evidence.

13. The appeal has been filed by two accused *inter alia* on various grounds that there is no legal evidence against the appellants

justifying the conviction. In the first ground, it is stated that the sanction order Ex. PW-5/A, recorded by Sh. K.D. Akolia (PW-5) Deputy Commissioner MCD is not in accordance with law and therefore the entire prosecution of the appellant is wholly illegal. The appellant No.1 was appointed by Commissioner of MCD vide appointment letter Ex. PW-5/DA and therefore the sanction of his prosecution could not validly be accorded by PW-5 who was admittedly working as Deputy Commissioner MCD.

14. The main contention is that there is not an iota of evidence on record to show that the appellant No.1 demanded a sum of Rs.3 lacs from the complainant Sh. C.K. Dhingra (PW-7). Infact even the complainant has emphatically denied the suggestion that appellant No.1 demanded Rs.3 lacs from him. In fact the complainant PW-7 never stated that the tainted currency notes were ever accepted by co-appellant Ishwar Kumar either for himself or for appellant No.1. The shadow witness Mahipal Singh (PW-2) had not supported the prosecution version at all either with regard to the alleged demand of bribe by appellant No.1 or regarding the alleged acceptance of bribe by appellant No.2. He was cross-examined at length but nothing came out during cross-examination which could in any manner advance the prosecution case. Shri Ram Sharma (PW-3) the other independent witness of the raiding party has totally disproved the prosecution case.

15. The case of the appellants also is that the evidence of the cassettes allegedly prepared at the time of commission of the alleged offence, the transcript of which is Ex.PW-6/C is actually no evidence

at all because it contains only some traffic noise and nothing else. Infact the micro cassettes allegedly prepared by Investigating Officer at the time of the commission of alleged offence was never produced in original in Court. This is a clear admission both by PW-2 and complainant C.K. Dhingra (PW-7) that all the memos etc. were already prepared and lying in the CBI office where they were made to sign them, made the entire prosecution case as wholly unreliable. Even without prejudice it is submitted that the complainant admitted in the Court that the unauthorized building constructed by him was still in existence and its use was also in violation of the purpose for which it could be used. This factor alone shows the falsify of prosecution version. The evidence of PW-4 Rakesh Kumar and R.K. Jain (PW-10) proved that appellant No.1 was a very honest officer and worked according to rules without there being any complaint against him.

16. Mr. R.V. Sinha, learned counsel appearing on behalf of CBI submitted that the case of the prosecution is supported by the complainant, panch witnesses and the Trap Laying Officer and is further fully corroborated by the circumstantial evidence available on record along with the transcript of the tape recorded conversation. Motive behind the said demand is established from the circumstances which compelled the complainant to make a complaint to CBI and accordingly the trap was laid.

He submits that as per facts of the present case the appellants were entrusted by the MCD to check the unauthorized construction as well as to take steps like demolition if the construction has been

raised in violation of the sanctioned plan. The appellant No.1, JE instead of carrying out the demolition of the property of the complainant in compliance with demolition orders issued, used the demolition order as a sword on the head of the complainant to extract the bribe amount and allowed the unauthorized construction to exist as it is.

17. Counsel for the CBI has referred the statement of PW-5 i.e. K.D. Akolia (Deputy Commissioner of MCD) who is the sanctioning authority. PW-5 admitted that as per the schedule attached with the regulations, the Commissioner can impose major penalty and Deputy Commissioner can impose minor penalty. It was further stated by the said witness that Deputy Commissioner are delegated with all the power of the Commissioner and under the delegation he was competent to award major penalty in the category "C" employees. As per the sanction order dated 26th August, 2002 Ex. PW5/A passed in this case PW-5 i.e. K.D. Akolia was authorized/competent to remove appellant No.1, appellant No.2 and Shakti Veil. The sanction order itself coupled with the powers delegated by the Commissioners, MCD vide Ex. PW5/B is sufficient to prove that the sanction has been granted by the competent authority.

18. It is submitted by the learned counsel for the CBI that though the complainant i.e. PW-7 was declared hostile but he had proved the complaint filed by him in accordance with law. The initial demand has been proved by way of the complaint as well as the subsequent conduct of the complainant and also by the statement of the complainant made before the Court. The transcript further

corroborates the initial demand and demand at the spot. The appellants took all precautions so much so that the demand was made by gesture and the installment plan was mentioned by appellant No.1 on the file by writing the figures and date. Material available on record would show the prosecution proved that the appellant No.1 was vigilant enough neither to touch the money with his hands nor to speak out the facts relating to payment of bribe.

With regard to the statement of complainant it is argued by Mr. Sinha, learned counsel for the respondent that the complainant had admitted the initial demand and that the demand at the spot was made by the appellants by saying that he i.e. the complainant “had to do something” and the appellant No.2 gesticulated with his head and only then he tendered the trap money. It is submitted that the above fact which is fully corroborated is sufficient to prove the acceptance of money by the appellants who had visited the showroom in conspiracy with each other to collect the bribe amount from the complainant.

19. As far as the recovery is concerned, it is mentioned by Mr. Sinha, that appellants have not disputed the fact that the complainant did tender the money, however, it has been explained that the complainant was pushed by the appellant No.2 while he was keeping the money. However, explanation tendered by the appellants was held to be not convincing since when the money claimed to be thrust into the shirt, the shirt buttons were not broken. The money would have been accepted and voluntarily kept in the shirt and only then presence of phenolphthalein powder on the shirt and hands is

justified and not in any other manner as he has been tried to be done in the present case.

The statement of the TLO in the present case is another corroborative evidence available on record as he had no interest either in the complainant or in the accused. The TLO had stated that on his direction the witness Ram Sharma recovered the money from the inside pocket of the shirt of appellant No.2. The Special Judge did not find any reason not to believe the statement of the TLO. The appellants have not made out any case that the TLO had any animosity with them.

20. It is stated by Mr. Sinha, learned counsel for the CBI that Special Judge has correctly given its findings in the judgement after going through the evidence of various witnesses.

21. The CBI court has analysed each and every aspect of the matter and then passed the conviction order against the appellants. Mr. Sinha has read the relevant part of statement of witnesses referred in the judgments by CBI court in support of his submission as PW-1 K.S. Chhabra SSO Grade-1 CFSL, New Delhi, proved his report i.e. Ex.PW-1/A, wherein the contents of the bottle were examined and on analysis, the said solution gave positive test for presence of phenolphthalein and sodium carbonate. PW-6 Dr. Rajinder Singh, SSO Grade-1, CFSL, stated that he examined the recorded voice in cassette marked as Mark Q1 and S1 by auditory and voice spectrography and found that the voice sample marked as Q1 (a)(b)&(c) in cassette Q1 and voice sample S1(a)(b) &(c) are similar in respect to their frequency distribution, format etc, hence are

probable voice of the same person. PW-6 also prepared the transcripts of the recorded conversation in cassette Q-1 and submitted his report Ex.PW-6/A, Ex.PW-6/B and Ex.PW-6/C which bears his signature.

22. It is argued by Mr. Sinha, learned counsel for the respondent that the statement of the complainant fully proves that these transcripts pertaining to the conversation were recorded at the spot. Further, the portion which has been identified by him to be in his own voice or in the voice of the appellants is sufficient to corroborate the prosecution case. The transcripts fully proves that the appellant No.1 demanded Rs.50,000/- per shutter. The conversation not only proves the initial demand but also proves demand from the spot. The concerned tape recorded conversation, authenticity of which cannot be doubted, is so natural that only the concerned person could have talked in the said manner. The complainant and both the panch witnesses have admitted that the tape recorder to record the conversation was used at the spot. Further, the cassette contains the voice of the appellant No.1 and offering his search to the TLO, which part has also been relied upon by the appellant No.1 to prove his innocence, is sufficient to lend credibility regarding the accuracy of its contents.

23. On the issue of recovery the only discrepancy is as to whether the money was recovered from inside the shirt of appellant No.2 or from the floor. The Special Judge relying upon the testimony of the TLO and finding no coherent reason to disbelieve the same came to the conclusion that the recovery was affected from inside the shirt of

the appellant No.2, as the TLO stated that on his direction witness Shri Ram Niwas recovered the money. The statement of the TLO is corroborative evidence available on record as he had no interest in the complainant or animosity with the appellants. On the contrary, on the facts of the present case, TLO had taken all the necessary steps to ensure that the complainant who may be part of the builder mafia does not implicate an innocent public officer.

24. It is alleged that the money had been recovered from inside the shirt of appellant No.2 after he demanded by gesture of his head, further proved that appellant No.2 had the prior intimation and requisite knowledge about the purpose of visit of appellant No.1 to the complainant as well as purpose for which the money was being paid. The same goes on to prove the case of prosecution that A1 and A2 received the money for letting the complainant continue his unauthorized construction and not to demolish the same which has not been raised in accordance with the sanctioned plan. The demand was made only by the JE concerned and the services of appellant No.2 were issued to accept the money. The complainant has admitted that the demand at the spot was made by both the appellants by saying that complainant had to do something and gesticulated with his head and only then the complainant tendered the trap money. The said fact is sufficient to prove acceptance of money by both the appellants who had visited the showroom in conspiracy with each other to collect the bribe amount from the complainant.

25. It is argued by Mr. Sinha that the demand and motive can also be proved from circumstantial evidence and subsequent conduct of the appellants. He has relied upon ***Noha Vs. State of Kerala and Others***, (2006) 12 SCC 277.

Similarly on the point of acceptance and recovery he has argued that the appellants demanded the money from the complainant by gesticulation on which the complainant passed the money to the appellants. The hand wash and the shirt wash turning pink proves the fact that the appellants had taken the money. Further, the tainted money was recovered on the direction of TLO from inside the shirt of the appellant by PW-3. The fact of recovery of money from the appellant once established raises the presumption under Section 20(1) of the PC Act that the said gratification was accepted as motive or reward for doing or forbearing to do an official act. He has relied upon ***Madhukar Bhaskar Rao Joshi vs. State of Maharashtra***, (2000) 8 SCC 571, ***T Shankar Prasad vs. State of Andhra Pradesh***, (2004) 3 SCC 753 and ***M Narasinga Rao vs State of AP*** (2001) 1 SCC 691.

It is submitted by him that though the complainant and witnesses have turned hostile, it would not be sufficient in itself to discard the prosecution case. The testimony of a hostile witness supporting the case of prosecution can be relied upon.

26. With regard to admissibility of tape recorded conversation, it is submitted by Mr. Sinha that 2nd May, 2001 is the date of incident and registration of F.I.R. on the basis of complaint Ex.PW7/A duly proved by the complainant. Tape recording memo Ex. PW-2/D show that

TDK 60 M cassette was used. Exhibit P.W.-2/E is the recovery-cum-seizure memo duly proved by P.W.2 and also by P.W. 7. The site plan exhibited as P.W.2/ F. The letter dated 14th May, 2001 of the S.P. CBI whereby sealed Audio Cassette marked as Q-1 was forwarded to Director,CFSL, New Delhi.

Specimen voice recording memo exhibit P.W.2/0- show that specimen voice of the accused was recorded in Audio cassette make TDK D 60. The letter dated 31st May, 2001 of S.P. CBI whereby whereby, one sealed Audio cassette marked S-1 along with specimen of CBI Sealed, containing specimen voice of the appellant No.1 was forwarded to Director CFSL.

The letter dated 7th September, 2001 P.W.6/A of Dr. Rajendar Singh confirming receipt of Q01 & S-1 in sealed condition. The letter dated 8th March, 2002 of Ravindar Kumar Senior Scientific officer grade II (photo) showing acknowledging the receipt of the cassettes. By communication dated 17th May, 2002, CBI had forwarded the transcription from the cassette marked Q-1.

27. After addressing his arguments Mr. Sinha submits that there may be few discrepancies/ inconsistencies but the fact of the matter is that those do not go into the root of the main case. The benefit of the same cannot be derived by the appellants. Thus the appeal is liable to be dismissed.

28. It is argued by Mr. Sunil Mittal, learned counsel appearing on behalf of the appellants that the entire prosecution case is inconsistent. The statements of prosecution witnesses are self contradictory. The demand, acceptance or recovery could not be

proved. The falsity of the prosecution version is writ large from the facts of the case and the evidence produced before the trial court. Neither the demand nor the acceptance nor the recovery of the alleged bribe amount could be proved by the prosecution against the appellants and thus the impugned conviction should be set aside.

29. He argues that as far as the principles of law laid down by the Supreme Court in the judgments referred by Mr. Sinha are concerned, the same cannot be disputed, however the same cannot be applied in the facts and circumstances of the present case. He submits that the prosecution has totally failed to establish its case beyond any doubt on essential issues raised in defence, hence the judgments referred by Mr. Sinha does not help the case of the respondent. He states that the trial court has ignored the inconsistencies on every aspect of the case who has merely accepted the entire case of the CBI without discussing the case of the appellants.

30. Mr. Mittal's next submission is that in the present case, not only did the Sanctioning Authority not deem it proper even to enquire prior to sanction as to whether he had the requisite power or authority to grant sanction, particularly since he was not the appointing authority of the appellant No.1, but he did not even hear the tape or peruse the transcript even though it was clearly mentioned that it was a trap case and which recording infact forms the basis of the conviction. It is stated that the Sanctioning Authority admits in his statement at page 186 that he simply filled up the blank portion of a draft proforma of a Sanction Order, got it retyped and affixed his signatures to the same.

31. He has relied upon the following judgments in support of his submissions :-

- i) ***Sampuran Singh Vs. State of Punjab***, AIR1982 SC 1407
- ii) ***State of T.N. Vs. M.M. Rajendran***, (1998) 9 SCC 268
- iii) ***Mansukhlal Vithaldas Chauhan Vs. State of Gujrat***, 1997 SCC (Cri) 1120
- iv) ***Mohd. Iqbal Ahmed Vs. State of A.P.***, AIR 1979 SC677
- v) ***State Vs. Ravinder Singh***, 1995(2) Crimes 85
- vi) ***Vinayak V. Joshi Vs. State***, 1968 Cri. L.J. 372

32. It is also submitted by Mr. Mittal that the essential ingredients of offences under Section 7 and/or Section 13(1)(d) and/or 13(2) are not made out upon consideration of testimonies of all the independent witnesses i.e. the Complainant (PW-7), Shadow witness Mahipal Singh (PW-2) and Panch witness Shri Ram Sharma (PW-3).

The complainant (PW-7), Shadow Witness (PW-2) are also consistent in the testimony that on the date of the trap i.e. 2nd May, 2001, when the cassette was replayed, the same contained no recording except for some traffic noise and further, that specimen voices were recorded only on the next date i.e 3rd May, 2001 in the office of CBI. When the sanctity of the tape recorded conversation itself is in doubt and the possibility of tampering cannot be ruled out, the same is not admissible and cannot be relied upon, particularly, as has been done in the present case the same being made as one of the sole ground for conviction.

Mr. Mittal, learned counsel for the appellants in this regard has relied upon the following judgments:-

- i) ***Nepal Singh Rawal Vs CBI***, 185 (2011) DLT 479
- ii) ***Nilesh Dinkar Paradkar Vs. State of Maharashtra***, (2011) 4 SCC143
- iii) ***Deepak Kumar @ Bittoo Vs. State***, 2012 II AD (Del) 381
- iv) ***Vishal Chand Jain Vs. CBI***, 2011 (1) JCC 570
- v) ***Roop Chand Vs. State***, 2011 (1) JCC 570

33. Lastly, it is argued by Mr. Mittal that the entire conviction is based on the uncorroborated testimony of the TLO i.e. PW-9 who not only was the Trap Laying Officer but also carried out all relevant investigations since the Investigating Officer (PW-8) admittedly carried out no investigation except collecting transcripts, opinion, etc.

It is submitted that uncorroborated testimony of the TLO cannot form the basis of the conviction, and in this regard, the appellants relied upon the following judgments:-

- i) ***Ram Prakash Vs. State of Punjab***, 1972 Cri.L.J 1293 (SC)
- ii) ***Roshan Lal Saini Vs. CBI***, 2011 (1) JCC 102
- iii) ***Prem Singh Yadav Vs. CBI***, 2011 (2) JCC 1059

34. Let me first discuss the issue of sanction of prosecution. The sanction for prosecution of the appellants was allegedly accorded to by Sh. A.D. Akolia (PW-5) vide sanction order dated 26th May, 2002 (Ex. PW-5/A). In examination in chief, PW-5 stated that he had examined all the statements under Section 161 of Cr. P.C., went through the CFSL Report and other materials relevant to this case. However, during his cross examination, this PW stated that he did not hear the alleged tape recorded cassette containing the alleged transaction. He further stated that he merely filled up the blank

portions of a draft proforma of sanction order and affixed his signatures after getting it retyped and never even called the IO. It is also pertinent to mention that PW-5 also stated in his cross-examination that he never perused the appointment letter of appellant No. 1.

In his cross-examination, PW-5 claimed that he has been delegated with all the powers of the Commissioner, MCD and by virtue of that delegation, he is a competent authority for grant of sanction. However, the dismissal order of the appellants (office order dated 18th August, 2005) was passed by the Commissioner, MCD which shows that the alleged delegation of power did not include the power to appoint or remove from the service and thus, PW-5 was not a competent authority for granting sanction for the prosecution of the appellants.

35. The grant of sanction, thus, is a solemn function which, the sanctioning authority is required to perform with due care and due application of mind to the material placed before him/her along with the request for sanction for prosecution.

36. Mr. Sunil Mittal, learned counsel for the appellants submits that in view of evidence of PW-5, it is clear that PW - 5, Sh. K.D. Akolia (Dy. Commissioner MCD Central Zone) was not a competent authority for issuing of sanction against the appellants since he neither had the power to appoint nor had the power to remove them from the service. He only filled up the blank portions of a draft proforma of sanction order provided to him which shows that there was no application of mind while passing the impugned sanction

order. Such sanction orders are without procedure and PW-5 also failed to appreciate the evidence placed before him in true perspective. He did not had any occasion to hear the alleged Tape Recording as the same was never produced before him before grant of sanction nor did he call the IO for any explanation.

37. The following judgments are relied upon on behalf of the appellants :

- ***The Management of Delhi Transport Undertaking v. Shri B.B.L. Hajelay and Anr.***, (1972) 2 SCC 744.
- ***Municipal Corporation of Delhi vs. Ravinder Kumar Gupta since Deceased Represented by his LR's***, 28 (1985) DLT 176.
- ***G.S. Matharao vs. CBI***, CrI.M.C 2695/2010 decided on 25th January, 2012. (Para No. 20-23)
- ***Mohd. Iqbal Ahmed vs. State of Andhra Pradesh***, (supra)(Para 3)
- ***State of Karnataka vs. Ameer Jan***, AIR 2008 SC 108.

38. In light of the decisions referred by him, it is clear that the power of delegation does not include the power to appoint and remove any person from the service and therefore, PW - 5 was not a competent authority for granting sanction for the prosecution of the appellants.

39. The position of law with regard to the scope of Delegation of Powers under Section 491 of the Delhi Municipal Corporation Act, 1957 has already been settled by the Supreme Court in ***The Management of Delhi Transport Undertaking v. Shri B.B.L.***

Hajelay and Anr., (supra) wherein the decision of the Full Bench of this Court was upheld and following decision was given:

“It is, therefore, clear that a protection which is given to an employee by the statute cannot be nullified by ruled and regulations authorised by the statute itself. In other words, any regulation made by the Corporation which would have authorised the Assistant General Manager to remove respondent No. 2 from service would have been inoperative qua respondent No. 2 as his appointing authority, was the General Manager (Transport). The question now is whether, if the Corporation itself by any regulation could not have destroyed the above protection given by the statute to respondent No. 2 it would be appropriate to say that the General Manager by an order delegating his functions to the Assistant General Manager under Sections 491 read with 504 of the Corporation Act could destroy the protection. Since the General Manager (Transport) is an officer of the Corporation and subordinate to the Corporation, it will amount to saying that what the Corporation could not do by a regulation could be done by an officer of the Corporation by merely delegating his functions to the Assistant General Manager. The position would look ridiculous. The true position in law is that while Sections 491 and 504 read together authorised the General Manager (Transport) to delegate his powers and functions to a subordinate, they did not authorise delegation of his rank. What is involved in matters of appointment and removal is the status and rank of the employee and the status and rank of the authority taking action. When the proviso to Sub-section (1) of Section 95 says that an officer and an employee shall not be dismissed by an authority subordinate to that by which he was appointed the subordination is of rank and not of functions. The proviso places an embargo on any subordinate of the appointing authority from removing or dismissing an employee from service and, Therefore, the High Court was right in holding in the present case that the

removal of respondent No. 2 by the Assistant General Manager (Transport) was illegal."

40. The said decision has also been followed by this Court in ***Municipal Corporation of Delhi vs. Ravinder Kumar Gupta since Deceased Represented by his LR's***, (supra).

41. No doubt, it has been repeatedly held by the Courts that the object behind this provision is to provide a reasonable protection to the public servant against undue harassment by disgruntled elements against whom he might have taken some decision during the course of his official duty. The grant of sanction, thus, is a solemn function which, the sanctioning authority is required to perform with due care and due application of mind to the material placed before him/her along with the request for sanction for prosecution. But at the same time, it depends upon the case to case basis and facts and evidence on record.

42. It is true that it has been consistently held by the Supreme Court and various High Courts that the sanction for prosecution under Section 19 of PC Act is not a mere paper formality. It is a mandatory requirement of law even for taking cognizance by the Special Judge. Any proceeding/trial initiated on the basis of an improper or illegal sanction order is *void ab-initio* and thus the impugned conviction is liable to be set aside.

43. In the light of arguments of the appellants and the material available as to whether the sanction has been properly granted against the appellants in accordance with facts and law or not.

44. In the present case it is not disputed that the appellant No.1 was working as JE and appellant No.2 as Beldar in MCD. The sanction for prosecution has been given by PW-5 Sh. K.D. Akolia vide sanction order Ex. PW5/A. In cross examination he has been confronted with the appointment letter Ex.PW-5/DA to show that accused No.1 was appointed by Commissioner, but PW-5 has deposed that the Dy. Commissioners are delegated with the powers of Commissioner and under the delegation of power he was competent to award major penalty to category C and office order to this effect is Ex.PW5/B. The appointment order Ex. PW5/DA, on the basis of which accused No.1 is claiming that he was appointed by the Commissioner would show that he was a stop gap arrangement under the orders of Commissioner dated 31st May, 1989 which was an *ad hoc* appointment for a period of six months or till such time the post were to be filled on regular basis without conferring any right to the post on the persons who were working as daily wager work-assistant. The name of accused No.1 figures at No. 16 in this list. The Commissioner's office order dated 3rd September, 1997 delegating the powers vested in him under Section 491 DMC Act to Deputy Municipal Commissioners Ex. PW5/B reads as under :

“In exercise of the powers vested in the under Section 491 of DMT Act, 1957, I hereby direct that all the powers conferred on me under various sections of the said Act, shall, subject to any overall supervision, control and review be also exercised by the following Deputy Municipal Commissioners with effect from the date mentioned against each....”

45. The name of the sanctioning authority Sh. K.D. Akolia has been mentioned at serial No.6 in the abovementioned order and powers has been conferred upon him w.e.f. 27th August, 1997. This order has been signed by Sh. V.K. Duggal, Commissioner, MCD. The sanction order Ex.PW5/A passed in this case is dated 26th August. 2002 and it is mentioned on the last page of the sanction order that Sh. K.D. Akolia was authority competent to remove the said appellant No.1, JE, appellant No.2 and Shakti Veil, Beldars, MCD (Building), Lajpat Nagar, New Delhi from the office and after examining the material, he granted sanction for prosecution of all the three accused persons. The sanction order itself coupled with the powers delegated by the Commissioner, MCD vide Ex.PW5/B would prove that the sanction has been granted by the competent authority. PW-5 has also deposed before the Court during cross examination that he was competent to award major penalty to category C employees.

46. i) In ***Gurcharan Singh vs. State***, 1970 Cri. L.J. 674 the Division Bench of the Punjab High Court observed that the intention of the Legislature in providing for a sanction under Section 6 of the PC Act for the offence under the Act is to afford a reasonable safeguard for the public servants in the discharge of his official duties. The sanction does not intend that a public servant who is guilty of the particular offence mentioned in that sanction should escape the consequences of his criminal act by raising the technical plea of invalidity of the sanction. The sanction safeguards the innocent but does not shield the guilty person.

ii) In ***Central Bureau of Investigation vs. V.K. Sehgal and Anr.***, 1999 CrL. L.J. 4593 in which while discussing the provisions of Section 6 of P.C. Act it was held as under:-

"The absence of sanction or invalid sanction to prosecute public servant cannot be ground to set aside conviction and sentence for offence under P.C. Act, 1947. It was further held that while dealing with the appeal filed against the conviction and sentence of any offence mentioned in 1947 Act, the legal position is that no such conviction and sentences shall be altered or reversed merely on the ground of absence of sanction much less on the ground of want of competency of the authority who granted the sanction."

iii) In ***State of Madhya Pradesh Ors. v. Shri Ram Singh***, (2000) 5 SCC 88 , while dealing with the provision of P.C. Act it has been laid down as under:

"Procedural delays and technicalities of law should not be permitted to defect the object sought to be achieved by the Act. The overall public interest and the social object is required to be kept in mind while interpreting various provisions of the Act and decided cases under it. The facts of Bhajan Lal's case were distinguishable as in the instant case the Superintendent of Police appears to have applied his mind and passed the order authorising the investigation by an Inspector under the peculiar circumstances of the case. The reason for entrustment of investigation were obvious. The High Court should not have liberally construed the provisions of the Act in favour of the accused resulting in closure of the trial of the serious charges made against the respondents in relation to commission of offences punishable under an Act legislated to curb the illegal and corrupt practices of the public officers."

47. In view of the legal position referred to above as well as the object of Section 19 of the PC Act, I am of the view that while

granting the sanction order against public servant, it does not amount that the officer is passing the judgment against the accused parties. The same is granted on the basis of prima facie material available on record. The case of the accused is tested in the court of law and judgment is to be passed on the basis of evidence proved. In the present matter, the nature of material available on record, the sanction order Ex.PW5/A does not suffer from any infirmity. The decisions referred by Mr. Mittal do not help the case of the appellants as the material facts and evidence are different.

48. The trial Court has based the conviction essentially relying upon the recording carried out at the time of trap corroborated by parts of the testimony of the complainant i.e. PW-7, and the testimony of the Trap Laying Officer (TLO) i.e. PW-9.

49. It is the case of the CBI that micro cassette, noted above was used in the trap proceeding and the same was forwarded to the CFSL in sealed conditions based on which the CFSL had submitted its report PW6/A & B. He has also proved transcription Exhibit PW6/E. The cassette TDK D 60 was used for recording of voice of the appellant No.1 and the same was forwarded and examine as S-1. The recovery of cassettes, as noted above i.e. Q-1 & S-1 have duly been proved likewise the same has been corroborated and proved by P.W.6 in his report pertaining to the Audio cassette and transcriptions thereof any submission. There is no material contrary to this on the record nor was the witnesses examined by the defense before the trial court otherwise and there is no evidence on record in support of

the case of the defense that the tape used by the prosecution was fabricated.

50. The prosecution case also about the recording of voice in the cassette is that a tape recorder was given to the complainant (PW-7) with an instruction to switch it on as soon as he would start talking to the accused persons. The Panch Witness (PW-3) was given a transmitter so that he could hear the conversation between the complainant and the accused persons. The said conversation was allegedly got recorded on a Micro Cassette. The Recorder as well as the Micro Cassette were seized by the TLO (PW-9) at the spot, which is evident from the Recovery-cum-Seizure Memo.

It is a matter of fact that all the witnesses have stated that the audio cassette, which was allegedly recovered at the spot, contained only traffic noises. It contained no conversation of any sought so as to incriminate or implicate the appellants in any manner.

51. PW-2 (Shadow Witness) stated that the cassette which was seized at the spot did not contain any conversation but only traffic noises. He further stated that the said cassette was sealed by the CBI team at the spot itself. He also stated that they were called in the CBI office the very next day also, where both appellant No. 1 and the complainant (PW-7) were given a few typed pages and were asked to read them out loudly so that the CBI team could record their voice on the pretext of recording their sample voice. The version of the independent witness PW-2 (Shadow Witness) was also corroborated by the statement of another independent witness, PW-3 (Panch Witness). He has also stated that the seized cassette did not contain

any voice and the recording of voice of the appellant S.K. Saini and complainant was done in the CBI office on the next day. Even the complainant (PW-7) corroborated the fact that the seized cassette was neither audible nor it contained any incriminating conversation between the appellants and the complainant. The CFSL report in respect of the alleged tape recording also falsifies the case of the prosecution.

52. As per the Tape Recording Memo (Ex. PW-2/D), a *TDK 60 M* cassette (a micro cassette) was used in the trap proceedings for the purpose of recording the probable incriminating conversation between the appellant and the complainant. As per the Recovery cum Seizure Memo (Ex. PW-2/E) also, a micro cassette was sealed at the spot. This fact is also corroborated by the statement of the Trap Laying Officer (PW-9) that a micro cassette was seized and sealed at the spot. As per the CFSL Report both the cassettes containing the Questioned Voice, marked as "Q-1" and the Sample Voice, marked as "S-1" respectively were TDK D-60 cassettes, i.e. normal size (big) cassettes. The version of the appellants that recording in question was done by the CBI team in the CBI office on the next day of the incident and the original seized cassette never saw the light of the day.

PW-7 deposed that the cassette which was seized and sealed at the spot was again played in the CBI office on the next date. This proves that the seal of the seized cassette was opened in the office of CBI the very next day. Therefore, the possibility of tampering being done with the cassette cannot be ruled out.

53. Having gone through the impugned documents and material placed on record, it is clear that there are many inconsistencies and contradictions in the present case. Let me now examine the aspect of inconsistencies and contradictions and it is also to be seen as to whether those are vital part of the matter and if the same are even ignored, the prosecution has been able to make out its case beyond all reasonable doubts or not.

54. **Preparation of Transcript of the Audio Recording**

As per the Specimen Recording Memo (Ex. PW2/G, Page No. 403 of the TCR), the sample voice was recorded by the CBI on 31st May, 2001. It is a matter of record that the transcription of the alleged conversation was prepared by the CFSL department only on 17th May, 2002 (Ex. PW-6/B). In the absence of any transcription being there, how can the specimen voice of the accused and the complainant be recorded on 31st May, 2001. As per the testimony of PW-2 (Shadow Witness) and PW-3 (Panch Witness), the sample recording was done on the next day, i.e. 3rd May, 2001 whereas admittedly, the transcript was not available prior to 17th May, 2002.

55. Therefore, it is clear that no reliance can be placed upon the cassette produced by CBI before the Court as it appears that there is a discrepancy in the case of prosecution. Mr. Sinha has admitted before Court that there are certain typing mistakes while sending the cassettes before CFSL department though he says that infact the micro cassette was sent but due to oversight in the dispatch letters along with cassettes were sent, the exhibit number of micro cassette

was wrongly mentioned which contains the voice of the accused at the spot.

56. Admittedly, no certificate under Section 65 B of the Indian Evidence Act, 1872 was ever produced by the prosecution for the alleged tape recordings and Audio Cassettes.

57. The Supreme Court in **Anvar P.V. vs. P.K. Basheer**, (2014) 10 SCC 473 has held that:

"Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A - opinion of examiner of electronic evidence.

The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements Under Section 65B of the Evidence Act are not complied with, as the law now stands in India.

Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed Under Section 65B of the Evidence Act. That is a complete code in itself. Being a special law, the general law Under Sections 63 and 65 has to yield."

58. The said position of law was also followed and relied upon by this Court in **Ankur Chawla vs. CBI**, CrI. M.C. No. 2455/2012, decided on 20th November, 2014 as well as other decisions referred by the appellants. The details are given as under :

- ***Vishal Chand Jain vs. CBI***, 2011 (1) JCC 570 (Para Nos. 13, 14, 16, 18, 27 and 28)
- ***Ashish Kumar Dubey vs. State Through CBI***, 2014 (142) DRJ 396, (Para Nos. 36 to 43)
- ***Anvar P.V. vs. P.K. Basheer***, (supra) (Para Nos. 15 and 22)

59. In ***Nilesh Dinkar Paradhkar v. State of Maharashtra***, (2011) 4 SCC 143, the Supreme Court referred to the judgment in *R.V. Robson* (1972) 2 All ER 699 where it was observed as under :

“....The determination of the question is rendered the more difficult because tape recordings may be altered by the transposition, excision and insertion of words or phrases and such alterations may escape detection and even elude it on examination by technical experts.”

60. In the case of ***Anvar P.V. vs. P.K. Basheer & Ors.***, (supra) Supreme Court held as under :

“22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in *Navjot Sandhu* case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in

terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

23. The appellant admittedly has not produced any certificate in terms of Section 65B in respect of the CDs, Exhibits-P4, P8, P9, P10, P12, P13, P15, P20 and P22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground.

24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence on electronic record with reference to Section 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act.”

61. In the case of **Ankur Chawla vs. Central Bureau of Investigation**, passed in Crl.M.C. No.2455/2012 on 20th November, 2014, this Court held as under :

“16. To test the correctness of the aforesaid observations of the trial court, it has to be kept in mind that any electronic record is admissible in evidence only when it is in accordance with the procedure prescribed under Section 65B of the Indian Evidence Act, 1872. It is so said in view of the pertinent observations made by three Judge Bench of Apex Court in *Anvar P.V.* (supra) which are as under:-

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

XXXXXXXXXXXXXXXXXXXX

22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It

appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record is inadmissible.”

17. In the instant case, the impugned order is silent about there being any certificate under Section 65B of the Indian Evidence Act, 1872 in respect of the audio and video CDs and even during the course of hearing, it was asserted on behalf of respondent-CBI that aforesaid mandatory certificate of 18th December, 2009 is there, but respondent-CBI has failed to show that such a certificate has been filed alongwith the chargesheet. Attention of this Court was not drawn to statement of any witness to show that inference of criminal conspiracy can be drawn against petitioners. Pertinently, although this Court is not required to look into photocopy of certificate under Section 65B of the Indian Evidence Act, 1872 furnished in respect of fifteen CDs in packet ‘A’ but there is no such certificate in respect of the seven CDs in packet ‘B’ which is solely relied upon by the prosecution. Thus, aforesaid certificate (which is not on record) is of no avail. So, there is no point in now permitting the prosecution to place the original of such certificate on record. It was also not shown during the course of the hearing that when the

CDs were prepared but since this case was registered on 23rd November, 2009 therefore these CDs must have been prepared soon thereafter and the certificate under Section 65B of the Indian Evidence Act, 1872 has to be of the date when the CDs were prepared but the photocopy of the aforesaid certificate shows that it was prepared on 18th December, 2009 and is thus of no avail.

18. Since audio and video CDs in question are clearly inadmissible in evidence, therefore trial court has erroneously relied upon them to conclude that a strong suspicion arises regarding petitioners criminally conspiring with co-accused to commit the offence in question. Thus, there is no material on the basis of which, it can be reasonably said that there is strong suspicion of the complicity of the petitioners in commission of the offence in question. In the considered opinion of this Court, a prima facie case is not made out against petitioners and so they cannot be put on trial with the aid of Section 12 of the Prevention of Corruption Act or by resort to Section 120-B of IPC.

19. Consequently, impugned order is quashed qua petitioners only while clarifying that any observation in this judgment shall have no bearing on merits qua co-accused. Before parting with this judgment, I place on record my deep appreciation for the able assistance rendered by learned senior counsels for petitioners and Mr.R.V.Sinha, learned standing counsel for CBI in deciding these petitions.”

62. In the present case, as per the recovery memo Ex. PW-2/E and Tape Recording Memo Ex. PW-2/D, the recording was allegedly carried out on a Micro-Cassette Recorder KCR-30 along with transmitter TK-400 and a Micro Cassette from the same was sealed. The TLO i.e. PW-9 admits in his testimony that the Micro Cassette was seized by him through the Recovery Memo but “the same was

not shown in the Court". It is admitted that he did not prepare a copy of the cassette in question on the said date.

PW-6 i.e. SSO, CFSL in his testimony stated that he received two parcels being Q1 and S1 containing TDK D 60 IEC/ Type 1 Cassette as per Original Forwarding Memo sent by Photo Division on 9th July, 2001. It is admitted by the SSO that he did not seek permission from the Court for opening the seal of the cassette and nor did he send them back to the Photo Division after examination of the cassette.

63. It is evident that the Original Micro Cassette has never been produced before the Court and has not even been sent for examination in the parcel Q1 since the same did not contain a micro cassette and contained an audio cassette of TDK D60 IEC/Type 1. As per the report dated 8th March, 2002, a copy of the original cassette was made prior to sending it to the SSO Division, which was examined by PW-6.

64. No witness was examined by the CBI as to who prepared the copy or in whose presence the seal was broken and both the TLO i.e. PW-9 and the IO i.e. PW-8 neither opened the original cassette nor made copies or even sent the same. It has also been admitted by the complainant i.e. PW-7 that on the next day i.e. 3rd May, 2001, when the cassette was played in the office of CBI, the same was unsealed.

65. It is apparent that the sanctity of the seized micro cassette can in no manner be said to have been preserved and the grave omission has occurred on the part of prosecution to approve its case. Thus,

the reliance by the trial Court upon the tape recording is unsustainable.

66. In the present case none of the independent witness have fully supported the case of the prosecution in respect of either the demand or acceptance or receipt of money and infact, Mahipal Singh i.e. the shadow witness and Shri Ram Sharma, Panch Witness have belied the version of the prosecution. The complainant also in his testimony has not proved the case of demand, acceptance or gesticulations by the appellants who has rather contradicted the case of the prosecution except to the extent of stating that the appellant No.1 was not permitting him to carry out construction on his building No. L-13, Kalkaji and because of this harassment, he approached the CBI.

67. **Inconsistencies vis-à-vis the alleged complaint**

a) The evidence of the prosecution regarding the timing of the FIR in question is self contradictory. As per the FIR (Ex.PW7/A), the same was registered at 11.00 am on 2nd May 2001 whereas, as per the statement of the Trap Laying Officer, Inspector A.K. Malik (PW-9), it was stated by him in his Examination-in-chief that :

“On 2nd May 2001 I was posted as Inspector, CBI, ACB, Delhi. On that day complaint Ex. PW7/A was marked by the then SP Sh. Kamal Pant for verifying and registering the case. The endorsement made by the SP is at point –B on Ex. PW7/A”.

PW-9 further stated in his cross examination that :

“The complainant was seen by me in the office of SP at 1.00 PM.”

It has also been stated by the Panch witnesses that they reached the office of the CBI and met the Trap Laying Officer (TLO) only at about 2.30 PM on the date of incident, i.e 2nd May, 2001. In view of the aforesaid evidence, as to how the FIR could be registered at 11.00 am on 2nd May, 2001.

b) The complainant, C.K. Dhingra (PW-7) allegedly gave a written complaint only against appellant No.1 in the office of the CBI on 2nd May, 2001 alleging demand of Rs.3 lacs to be paid in installments of Rs.50,000/-, Rs.1,00,000/- and Rs.1,50,000/-. However, in his examination-in-chief, he stated that he gave a complaint against both the appellants herein.

c) In the examination-in-chief, the complainant/PW-7 clearly stated that he did not give any written complaint to CBI. He said that he never wrote the complaint in question on his own but was dictated by one CBI Official named Mr. Joshi who also alleged that complaint was not registered at the instance of the complainant but on the dictation of the Mr. Joshi and thus it creates the doubt in the mind of court under whose instance the complaint was prepared. Mr. Joshi was neither cited as a Prosecution Witness nor examined as a witness at any stage.

d) On 26th December, 2000, the appellant No.1 was assigned the duties of checking the unauthorized construction in the Kalkaji area (Ward No.10). On 27th December, 2000 itself, the appellant Sh. S.K. Saini, while discharging his duty of a JE in MCD lodged an FIR having file No.609/UC/B/C2/2000 against the present complainant for

the unauthorized construction carried out by the complainant on his property bearing L-13, Kalkaji, New Delhi (Ex. PW4/A).

Accordingly a Show Cause Notice dated 27th December, 2000 (Ex. PW4/B) was issued to the complainant by the AE, MCD (PW - 4) and since the complainant failed to appear before the authorities, a Demolition Order dated 5th January, 2001 was issued on the request of Appellant Sh. S.K. Saini (Ex. PW4/C).

Another demolition order dated 3rd April, 2001 (Ex. PW4/E) was issued against the said unauthorized construction carried out by the complainant.

e) PW - 4, Sh. Rakesh Kumar (A.E., MCD) had also stated in his statement before the trial court that despite the orders being passed by the MCD for demolition of the unauthorized building of the complainant, the same could not be done due to unavailability of police force. The appellant discharged his duties as a JE sincerely in a fair and honest manner. Since he already got the demolition orders passed, there was no occasion or reason for him to have asked for any alleged bribe from the complainant.

68. Inconsistencies in the prosecution case as regards demand and acceptance of the bribe.

The three relevant witnesses of the case, who could have proved any demand or acceptance in the present case are PW-2, Sh. Mahipal Singh (Shadow Witness); PW-3, Sh. Sri Ram Sharma (Panch Witness) and PW-7, Sh. C.K. Dhingra (the complainant himself). All these three witnesses did not support the prosecution case.

The complainant (PW-7) specifically stated, when he was cross-examined by the Ld. Prosecutor that :

"It is incorrect to suggest that accused S.K. Saini demanded Rs. 50,000/- from me on 2.5.2001 when he came along with Bobby."

Even the Shadow Witness (PW-2) consistently stated during his examination-in-chief and cross-examination that he never heard any demand for money being made by the appellants. The Panch Witness (PW-3) also denied that there was any conversation in the alleged audio cassette which confirmed either the demand or the acceptance of the bribe.

69. The Supreme Court and the various High Courts have unequivocally held in following judgements that in absence of any proof of demand having been made by the accused persons, mere acceptance of money or recovery of some amount cannot be a ground for conviction :

a) In the case of ***Suraj Mal vs. The State (Delhi Administration)***, (1979) 4 SCC 725 it was held as under :

“Moreover, the appellant in his statement under Section 342 has denied the recovery of the mosey 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. For these reasons, therefore, we are satisfied that the prosecution has not been able to prove the case

against the appellant beyond reasonable doubt. We, therefore, allow the appeal set aside the conviction and sentences passed against the appellant. The appellant will now be discharged from his bail bonds.”

- b) In the case of **A. Subair vs. State of Kerala**, (2009) 6 SCC 587, it was held as under :

“23. Mere recovery of currency notes (Rs. 20/- and Rs.5/-) denomination, in the facts of the present case, by itself cannot be held to be proper or sufficient proof of the demand and acceptance of bribe. When the evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence. It is true that the judgments of the courts below are rendered concurrently but having considered the matter thoughtfully, we find that the High Court as well as the Special Judge committed manifest errors on account of unwarranted inferences. The evidence on record in this case is not sufficient to bring home the guilt of the appellant. The appellant is entitled to the benefit of doubt.”

- c) In the case of **State (Govt. of NCT of Delhi) vs. Girdhari Lal Verma** 2011(3) JCC 1744, this Court held as under :

“7. The next issue that arises is whether the prosecution has proved the demand by the respondent at the time of trap. PW3 Jaipal Singh was accompanied by PW4, the panch witness and the driver. PW 3 does not depose in his testimony that the Respondent demanded money while sitting on the rear seat of the car along with him. According to PW 3, he stated to the Respondent that he had brought the papers relating to one public booth as also the money and requested him to correct the voters list for one polling booth. The Respondent told him that he had some work at his office at 5, Alipur Road regarding the transfers and that he would do the work first and then accept the papers and the money. The Respondent then enquired about PW4 Mr.

Khanna, to which PW 3 replied that PW 4 wanted permit for cement and he had to get him the permit. PW3 again offered money to the Respondent but he was reluctant and he took the car to the office of Food & Civil Supply, Under Hill Road. PW3 again offered him the money at the Food & Civil Supply Office, but the Respondent told him that they had to go to the office at Begum Zaidi Marg and he would accept the money there. On the pretext of going to the office of the Civil supplies PW3 and PW4 came out of the car and informed PW7 that the Respondent would take money only in Zaidi Market. He also told the Inspector that they would reach the Market by 6.30P.M. whereas, the Respondent remained seated in the car. They came back and got into the car. On reaching Begum Zaidi Market, PW3 got down and went to the office for 2-4 minutes while PW4 and the Respondent remained seated in the car. PW3 came back. He again offered the money to the Respondent while sitting in the car and gave money and papers. The Respondent took the money in his left hand and list in the right hand on which PW4 gave the signal to the raiding party. It is thus evident that in the entire testimony of PW3 it is nowhere stated that the Respondent demanded money. This evidence of PW3 is also corroborated by PW 4 who also in his testimony does not state that the Respondent demanded money rather has stated that at no stage money was demanded by the Respondent either initially or at the time of trap. Though, it is stated that money was given to the Appellant along with the voters list for correction and objections however, no documents have been seized from the right hand of the Appellant. No explanation has been offered by the prosecution as to why these papers were not recovered from the right hand of the Appellant by the raiding officer.

8. It is now to be examined that in the absence of any demand, would mere acceptance of money implicate the Respondent for offence punishable under Section 161 IPC and Section 5(1) (d) read with Section 5(2) of the PC Act,

specially when the corroboration evidence of post raid proceedings is not authentic. Demand is an essential ingredient for an offence punishable under Sections 161 IPC and 5 (1) (d) read with 5 (2) of the PC Act. Section 4 of the PC Act lays down a statutory presumption that in any trial for offence punishable under Section 161 of the IPC or 5(1) (a) or (b) punishable under Section 5(1) the Court is duty bound to raise a presumption after it is proved that an accused person has accepted or obtain or admitted to obtain for himself or any other person any gratification or any valuable thing. This presumption is not available for offence punishable under Section 5(1) (d) read with Section 5(2) of the PC Act. Hon'ble Supreme Court in *Banarsi Dass Vs. State of Haryana (2010) SCC 450* has held that to constitute an offence under Section 161 IPC & Section 5(1)(d) of the PC Act it is necessary that there is a demand of money and the same is accepted for doing a favour. Demand of Money is a sine qua non for the conviction of the accused. Thus, in the absence of demand and the presumption, the offence punishable under Sections 161 and 5(1) (d) read with 5(2) of the PC Act has not been proved beyond reasonable doubt by the prosecution in the present case."

- d) In the case of ***P.K. Gupta vs. Central Bureau of Investigation***, (2011) VI AD Delhi 692, this Court held as under :

"21. The fact that PW2 stated and maintained that CBI official told co-accused PS to give the money to the appellant and in that event he would be released, and in fact was released, would have prompted co-accused PS to hand over the bribe money to the appellant to save himself. It was also the case of the prosecution and so deposed by PW2, PW4, PW6 and PW7 that the money was to be paid by co-accused PS to the appellant on a specific demand. It is gathered from the evidence of these witnesses that PW4 R. Murali who was to act as a shadow witness in the transaction of giving of money by the co-accused PS to the

appellant, did not go inside the room, but remained standing outside the door of the room. It was the co-accused PS alone who had gone inside the room and gave money to the appellant. Admittedly at the time of giving of money by the co-accused PS to the appellant, no conversation took place between them. As per PW4 R. Murali, the money given by co-accused PS was taken by the appellant and kept in his pocket. There was nothing on record to suggest that there was any demand by appellant. There is no evidence relating to demand emanating from the appellant at this stage as well. There was no conversation between the two at this stage. It is entirely improbable that accused PS while giving money to appellant would not speak with him and tell him that he has made collections instructed or that appellant would not inquire from him about the details of the manner of collections. Accused PS knew that PW-4 is present near the door. He would have spoken with the appellant to impress upon PW-4 that he actually collected money at the instance of the appellant. He was instructed by the CBI to pass on the money to appellant on specific demand, but he without speaking with the appellant or any act demonstrating that he had actually collected the money on his behalf gave money to him. It all casts serious doubt on his version that he demanded and accepted the money on behalf of the appellant. In these circumstances the taking of money by the appellant cannot be acceptance of bribe money in pursuance of any demand by appellant. Accused PS in answer to a question in his statement under Section 313 Cr.P.C also indicated that no such demand at that time was made by the appellant. In the background of the fact that there was no reliable evidence regarding initial demand made by the appellant from the complainant, PW2, and there being no evidence of any demand being made by the appellant from accused PS, the mere giving of money by PS to the appellant cannot be taken as acceptance of bribe by the appellant from co-accused PS. Neither from his action in accepting the money from

accused PS nor from his conduct, it could be said with certainty that the appellant had accepted the money to be as bribe money. In the circumstances, it could not be ruled out that accused PS had demanded and accepted the money from the complainant in the name of the appellant. The entire evidence as led by the prosecution in this regard was shaky and thus unreliable.

22. In view of such evidence, the recovery of tainted money from the appellant alone could not be said to be sufficient to hold him guilty of the offences under Section 161 IPC and Section 5(1)(d) of the Act. On this ground alone, the appellant was entitled to acquittal on account of benefit of doubt.”

- e) In the case ***of Surender Singh vs. State (NCT of Delhi)***, 2014 (4) JCC 2766, this Court held as under :

“15. In the present case, there were two key elements that were required to be proved by the prosecution. One was the demand of bribe by the Appellant and the other its conscious acceptance by him. The consistent stand of the Appellant was that he had been falsely implicated. He stated that he had been apprehended from his seat in his office and not at the tea stall where according to the prosecution the raid was supposed to have taken place. With the complainant PW-5 not supporting the prosecution, the demand of bribe prior to the raid cannot be said to have been proved. As regards the demand of bribe at the time of the raid, the evidence of the *panch* witness was critical for the prosecution.

16. A careful perusal of the evidence of PW-7 shows that in his examination in chief he spoke of the conversation that took place on the spot between PW-5 and the Appellant. According to him, the Appellant asked PW-5 whether he had brought the bribe amount, and PW-5 replied in the affirmative and then took out the treated GC

notes from the pocket of his shirt and handed over the same in the right hand of the Appellant. However, in his cross-examination PW-7 gave a changed version and stated:

“When we reached near the tea vendors stall the Complainant and the accused were talking in a low voice in fact it was more or less in a whispering tone. **It is correct that as they were talking in a low pitch so I could not hear their talks properly.** As far as I remember the Complainant might have told me the conversation which took place between him and the accused as I could not hear the whole of it because it was not fully audible. **It is correct that I did not state to the police that the accused had asked the Complainant if he had brought the bribe money** (The prosecutor has stated that the witness stated in his statement under Section 161 Cr.PC that on the way the *Patwari* also asked if he had brought money. He has stated that the question of asking money itself has implied reference to bribe money). It is correct that I did not specifically state in my statement to the IO the word “Bribe”. Vol. the word bribe is implied in my statement made to the IO.” (emphasis supplied)

17. The above admission on the crucial aspect of the case by PW-7 makes him an unreliable witness both as regards the demand made at the spot and the subsequent acceptance of the treated GC notes by the Appellant. The trial Court noticed the above change of stand but stated that “this admission alone is not sufficient to give clean chit to the accused.” However, the question is whether the above evidence can be safely relied upon as proving beyond reasonable doubt the guilt of the Appellant. On this crucial aspect, the trial Court appears to have proceeded on the basis that the Appellant is guilty unless proved otherwise.

18. This flawed approach appears to have further persuaded the trial Court to overlook the discrepancies as regards the link evidence concerning the hand washes. The trial Court simply accepted the FSL report without noticing that the prosecution failed to establish the link evidence that would lend assurance that the hand and shirt wash samples were safely preserved. The evidence in this regard, as noticed hereinbefore, raises considerable doubts whether the hand and shirt wash samples sent to the FSL were in fact those purportedly collected at the spot.

19. In **B. Jayaraj v. State of A.P. 2014 (4) SCALE 81**, the Supreme Court cautioned that the prosecution has to prove the key ingredients beyond reasonable doubt before the presumption under Section 20 PC Act can stand attracted. In **Mahavir Singh v. State 2014 (141) DRJ 149** it was pointed out that in the absence of a proof of demand, the question of raising the presumption under Section 20 PC Act would not arise unless it is shown that there was conscious acceptance of the amount knowing it to be illegal gratification.

20. With the evidence of PW-7 being unclear as to the conversation on the spot, and with reliable link evidence concerning the samples of the washes being absent, the mere fact that GC notes were recovered from the Appellant and his hand and shirt washes turned pink do not lend sufficient assurance to the Court that the case against the Appellant stands proved beyond reasonable doubt.”

- f) In the case of **Vishal Chand Jain @ V.C. Jain vs. C.B.I.**, 2011 (1) JCC 570, this Court held as under :

“27. Ex.PW5/B is the Voice Specimen Memo, which according to the prosecution was prepared at the time of recording specimen voice of the appellant. On perusal of this document, it transpires that the appellant V.C.Jain was given the text of the transcript of conversation which was

recorded on 20.9.2002 between the complainant and the accused, with the instructions to read the same for the purpose of recording and he obliged by following the instructions. If this is true, then the transcript of the conversation between the appellant and the accused must have been prepared prior to the recording of voice specimen of the appellant. This, however, is not the case. The specimen voice of appellant was admittedly recorded on 21.9.2002 whereas as per the statement of Investigating Officer PW9 Inspector Alok Kumar, the transcript of the recording of conversation between the appellant and the complainant during trap was prepared on 30.9.2002. This is also confirmed by recorded voice transcription memo Ex.PW-2/H prepared by Inspector Alok Kumar. It is not clear how Trap Laying Officer Inspector Balachandran, on 21.9.2002 could provide the transcript of the conversation recorded at the time of trap on 20.9.2002 to the appellant for recording the specimen voice when the said transcript, as per the Investigating Officer, was prepared on 30.9.2002. Further, as per the voice specimen memo Ex.PW-5/B, Trap Laying Officer Inspector P.Balachandran gave transcript of the conversation which took place at the time of trap on 20.9.2002 to the appellant and asked him to read the same for recording the specimen voice for comparison. It is not understandable as to why the appellant was made to read the exact transcript of the conversation. This circumstance raises a strong possibility that the voice specimen recorded on 21.9.2002 might have been used for fabrication of the audio record of conversation between the complainant and the appellant which took place at the time of trap. The doubt is compounded for the reason that if the transcript was already available on 21.9.2002, there was no occasion for the I.O. Inspector Alok Kumar to prepare another transcript on 30.9.2002. Thus, in my view, audio recording of the conversation is suspect and the prosecution cannot take advantage of said recording.”

- g) In the case of ***Ashish Kumar Dubey vs. State Thr. CBI***, 2014 (142) DRJ 396, this Court held as under :

“36. Another important aspect is the recording of the conversation that allegedly took place between PW6 and the Appellant, which was done by PW6 with the help of an MCR which PW5 had apparently given to her. If indeed it was a micro cassette, then it was for the prosecution to explain how the parcel Q3 given to the CFSL contained a regular TDK D-60 cassette and not a micro cassette. It is not clear when the contents of the micro cassette were transferred to a larger cassette for being given to the CFSL. Also, it appears that the MCR given by PW5 to PW6 on 19th August 2002 was different from the MCR given to him by PW11 during the pre-raid proceedings for which the handing over memo Ex. PW1/G was drawn up.

The conversation on 19th August 2002

37. The next aspect of the matter as regards the conversation between PW6 and the Appellant which purportedly took place on 19th August 2002 is that the device by which the conversation was recorded was not itself examined. This was important since a specific question was put to the scientific expert (PW3) whether the device was tampered or not. In his cross-examination, PW3 stated: “As I was not asked to give opinion whether the cassette was tampered or edited, I have not expressed any opinion on this aspect.”

38. At this stage, it is important to recall the requirements of law, as spelt out in ***Ram Singh v. Col. Ram Singh*** which read as under:

“(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for

the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

(2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence – direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of the Evidence Act.

(5) The recorded cassette must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.”

39. The above statement of PW3 was in the context of the third test which required ruling out “every possibility of tampering with or erasure of a part of a tape recorded statement.” What the learned trial Court in the instant case has done is examined the 5th requirement that “the recorded cassette must be carefully sealed and kept in safe or official custody.” The learned trial Court has failed to notice that the third requirement spelt out in **Ram Singh v. Col. Ram Singh** was not satisfied in view of the above answer of PW3. The official safety of the parcel contained in the cassette is not the same thing as ruling out the possibility of tampering with a tape recorded statement.

40. In ***Nilesh Dinkar Paradkar v. State of Maharashtra (2011) 4 SCC 143***, the Supreme Court referred to the judgment in ***R. V. Robson (1972) 2 All ER 699*** where it was observed as under:

“....The determination of the question is rendered the more difficult because tape recordings may be altered by the transposition, excision and insertion of words or phrases and such alterations may escape detection and even elude it on examination by technical experts.”

41. Both in ***Ram Singh v. Col. Ram Singh*** and ***Nilesh Dinkar Paradkar v. State of Maharashtra*** reference was made to **Archbold Criminal Pleading, Evidence and Practice** (Chapter 14) which lays down that the factors that would be relevant for the purpose of correct identification of voice. One of this is “quality of the recording of the disputed voice.” Reference was also made to **American Jurisprudence 2d** (Vol.29) according to which for admissibility of a sound recording it had to be shown *inter alia* that “the recording device was capable to taking and testimony”; that the recording was authentic and correct and “the manner of the preservations of the recording” was also shown. This is apart from the fact that tape recorded evidence can only be used as a corroboration evidence.

42. The MCR used in the present case by PW6 to record the conversation was not submitted to CFSL. Without the device being examined and without the cassette itself being examined for ruling out the possibility of tampering, one of the important requirements spelt out in ***Ram Singh v. Col. Ram Singh*** was not satisfied in the present case. This rendered the Q3 cassette an inadmissible piece of evidence.

43. In the present case as already noticed although the voice may have been identified by PW-6 to be that of

Appellant, the third test in **Ram Singh's** case that the tape recorded conversation must be shown to be not tampered or capable of being tampered, has not been satisfied.

70. Had the complainant (PW-5) fully supported the case of prosecution on the aspect of the demand of a bribe by the Appellant, it would still be possible to consider whether the evidence of PW-11 could be held to be sufficient proof of the acceptance of the bribe amount by the Appellant as regards what transpired at the spot. However, as already noticed, PW-5 was an unreliable witness. Interestingly, some of the members of the pre-trap proceedings, Inspector AK Singh and Inspector Surender Malik, do not appear to have been examined. We have only evidence of PW-11 who arrived at the spot after the pre-arranged signal of PW-4. PW-11 was himself not a witness to the acceptance of the bribe amount by the Appellant. If there was a struggle as spoken of by PW-4, then the mere fact that the GC notes were flung on the ground by itself would not prove the acceptance of the bribe amount by the Appellant. On the critical aspects of the case therefore, the uncorroborated evidence of PW-11 cannot help prove the case of the prosecution beyond reasonable doubt."

Both PW-2 (Shadow Witness) and PW-3 (Panch Witness) have consistently stated before the Special Court that no money was ever demanded or accepted by the appellants. They further stated that the complainant himself was trying to forcefully give the said tainted notes in the hands of appellant No. 2. The complainant/PW-7 even tried to thrust the same in the gap between the two buttons of the shirt of the appellant No. 2 while appellant No. 2 resisted the same and in this process, the wad of notes fell on the ground. (Statement of PW - 2).

The recovery of tainted notes from the ground is also corroborated from statement of the complainant (PW-7) who stated that the said notes fell on the ground while he was giving them to the appellant No. 2.

PW-3 (Panch Witness) categorically stated in his statement before the Court that the said notes were never recovered from the shirt of the appellant No. 2. It has been further stated by PW-3 that he only signed the recovery/seizure memo but he neither read the recovery memo nor he was told anything about the contents written therein.

PW-2 (Shadow Witness), in his statement before the trial court, has also corroborated the fact that the said tainted currency notes were never recovered by PW-3 from the shirt of the appellant No. 2.

The Trap Laying Officer (PW-9) stated in his examination-in-chief that he asked PW-3 to recover the tainted notes from the person of appellant No. 2. However, PW-3 and PW-2 have stated that the said notes were not recovered from the shirt of the appellant No. 2.

70. Under these circumstances mentioned above, apart from failing to prove the evidence of voice recorded beyond doubt, there are many inconsistencies in the evidence brought on record by the prosecution. The evidence produced by the prosecution was insufficient and inconsistent to return the clear conclusion of guilt against the appellants beyond all reasonable doubts. The impugned judgment dated 14th February, 2005 and the order of sentence dated 15th February, 2005 passed by the trial court are set aside and the appellants are acquitted of the offences.

71. The appeal is allowed accordingly. No costs.
72. The trial court record be sent back by the Registry.

AUGUST 19, 2015

**(MANMOHAN SINGH)
JUDGE**