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

Judgment reserved on: 11.03.2015

% **Judgment delivered on: 19.04.2016**

+ **Crl.A. 263/2009**

GIRWAR SINGH

..... Petitioner

Through: Mr. R.N. Mittal, Sr. Adv. with Mr. Abhijeet Singh, Advocate.

versus

C.B.I.

..... Respondent

Through: Mr. Narender Mann, SPP with Mr. Manoj Pant and Ms. Utkarsha Kohli, Advocates.

+ **Crl. A. 279/2009**

LALA RAM

..... Petitioner

Through: Mr. Tanveer Ahmed Mir and Ms. Megha Gurnani, Advocates.

versus

C.B.I.

..... Respondent

Through: Mr. Narender Mann, SPP with Mr. Manoj Pant and Ms. Utkarsha Kohli, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J.

1. These two appeals have been preferred by the two appellants individually under Section 374 Criminal Procedure Code, 1973 (Cr PC) to assail the common judgment dated 21.03.2009 and order of sentence dated 23.03.2009 passed by Learned Special Judge, in CC No. 30/2003 arising out of F.I.R No. RC-DAI-2002(A)-0035 under Section 120-B, Indian Penal Code, 1860 (IPC) read with Section 7 and Section 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988 (PC Act). Appellant Girwar Singh – the appellant in Crl.A. 263/2009 (hereinafter referred as ‘Appellant No. 1’), was sentenced to undergo Rigorous Imprisonment (‘R.I.’) for one year with fine of Rs. 5,000/-, and in default of payment of fine, to undergo Simple Imprisonment (‘S.I.’) for 7 days for offence punishable under Section 120-B IPC. He was further sentenced under Section 7 of the PC Act to undergo R.I. for a period of two and a half years and to pay a fine of Rs. 15,000/-, and in default of payment of fine, to undergo S.I. for 15 days. He was sentenced to R.I. for three years and to pay a fine of Rs. 20,000/-, and in default of payment of fine, to undergo S.I. for 15 days for offence punishable under Section 13(2) read with Section 13(1)(d) of the PC Act. Appellant, Lala Ram – the appellant in Crl.A. 279/2009 (hereinafter referred to as ‘Appellant No. 2’), was sentenced to undergo R.I. for one year and a fine of Rs. 5,000/-, in default of payment of fine, further S.I. for 7 days for offences punishable under Sections 120-B IPC. He was further sentenced under Section 7 of the PC Act to undergo R.I. for a period of two years and to pay a fine of Rs. 10,000/-, and in default of payment of fine, to undergo S.I. for 15 days. He was sentenced to R.I. for two and a half years and to pay

a fine of Rs. 15,000/-, and in default of payment of fine, to undergo S.I. for 15 days for offence punishable under Section 13(2) read with Section 13(1)(d) of the PC Act. All the sentences of appellant no. 1 and appellant no. 2 were directed to run concurrently.

2. The facts in both the appeals arise out of the same FIR (Ex. PW-14/A) dated 03.06.2002. Appellant no. 1 Girwar Singh was a Senior Audit Officer, and appellant no. 2 Lala Ram was an Assistant Audit Officer working in the Sales Tax department.

3. The facts as enumerated in the charge-sheet are that the prosecution/C.B.I. registered the case on 03.06.2002 on the basis of the written complaint of Sh. Rajpal Katyal (PW-3), Proprietor, M/s. Kailash Engineers (hereinafter referred to as 'Firm'). He *inter alia* stated that he was having a business of spare parts of diesel generator sets and the firm was registered with Delhi Sales Tax Department. An audit party of Accountant General of Audit, Delhi was doing audit of Sales Tax Department from 30.04.2002 to 27.05.2002. Complete folder of M/s. Kailash Engineers was handed over to Audit Party on 15.05.2002. On 23.05.2002, his Accountant Sachin Arora was called by Audit Branch of Sales Tax Department, where he met appellant no. 2, Assistant Audit Officer, who asked Sachin Arora (PW-5) to produce some documents for the year 1996-97 and 1997-98. Appellant No. 2 further informed that the purchase orders have not been enclosed with "C" forms, and ST-I form was not enclosed with the return for the year 1997-98. On 27.05.2002, Rajpal Katyal sent the documents through Sachin Arora but appellant no. 2 demanded Rs. 15,000/- for accepting the documents and stated that he would, otherwise, raise audit objections.

Thereafter, on 30.05.2002, Rajpal Katyal again sent Sachin Arora to Sales Tax Office to enquire the purpose of demand of money. After visiting Sales Tax office, appellant no. 2 introduced Sachin to appellant no. 1, Senior Audit Officer, who told that they have studied the case and found that one ST-I Form in return of 1997-98 was deficient, and a demand of Rs. 6 lacs could be raised on that ground, but the matter could be closed if Rs. 40,000/- are paid – and not Rs. 15,000/- as demanded by appellant no. 2. It was further informed that the amount was to be shared by all members of the audit party. On 31.05.2002, Rajpal Katyal himself visited Sales Tax Office and contacted appellant no. 1 & 2 and enquired about his firm's case. Both the appellants informed him that the matter had been explained to his Accountant the previous day and that the amount to settle the matter had also been intimated to Sachin Arora. Rajpal Katyal expressed his inability to pay such a huge amount, whereupon appellant no. 1 reduced the amount to Rs. 30,000/- stating that it could not be reduced further, as the same was to be shared by other members of his team and directed him to pay the bribe by 03.06.2002. Since he did not want to pay the bribe, he lodged the complaint (Ex. PW-3/A).

4. After the registration of the case, the trap party headed by Inspector Umesh Vashishth, Trap Laying Officer (TLO) (PW-14) was constituted and two independent witnesses –Sh. S.S. Rana, shadow witness (PW-8) LDC, Staff-III and Sh. Mann Singh, recovery witness (PW-4) Assistant, both from the office of Director General, Doordarshan, Mandi House, were associated. During the pre-trap proceedings, the complainant Rajpal Katyal produced Rs. 20,000/- in the form of 40 GC notes of Rs. 500/- denomination each.

The numbers of GC notes were noted in the Annexure A to the Handing Over Memo (Ex. PW-3/C). Inspector C.K. Sharma gave a demonstration by applying phenolphthalein powder on those GC notes and showed its reaction with sodium carbonate, the solution turned pink. After treatment, the treated GC notes were handed over to the complainant (PW-3), with the direction to hand over the tainted GC notes to appellant no. 2 or his associates on specific demand. Further, the shadow witness Mann Singh (PW-4) was directed to act as a shadow witness and give the signal by scratching his head with both the hands after the bribe transaction was over. The complainant (PW-3) was also directed to give a signal by dialling the pre-fed mobile number of 'CBI' Mobile No. 9810636241 from his mobile no. 9810660147. A Samsung digital recorder, SVR 240, was also handed over to the complainant (PW-3) for recording the conversation at the spot, as per the 'Tape Recording Handing Over Memo' (Ex. PW-3/D).

5. At about 2:00 PM, the trap party along with the two independent witnesses aforesaid and the complainant (PW-3) left CBI office and reached Sales Tax Office, ITO at about 2:25 PM. The complainant (PW-3) and shadow witness (PW-4) were directed to enter room no. 902 and contact the appellants, whereas the other members of the trap party took suitable positions near the office of the appellants at 9th floor. The complainant (PW-3) discussed with the appellant No.1, about the bribe amount to be paid for the settlement of sales tax matter. After the conversation, the complainant (PW-3) paid the tainted amount of Rs. 20,000/- to appellant no. 1 and stated that the remaining amount would be delivered later on. Appellant No. 1 accepted the bribe amount by his right hand and after counting them, kept

the same in his left hand. After the bribe transaction was over, the shadow witness (PW-4) went outside and gave the pre-determined signal. The complainant (PW-3) also gave the signal through his mobile and in the meantime, appellant no. 1 leaned towards his left side and hid the bribe amount. On receipt of pre-determined signal at about 3:00 PM, the trap party entered in the office room and challenged appellant no. 1 having demanded and accepted Rs. 20,000/- as bribe amount. Thereafter, the bribe amount, which had been concealed under the carpet near the left side of appellant no.1, was recovered and the number of GC notes tallied. The wash of both the hands of appellant no. 1 as well as portion of carpet under which the amount had been concealed were taken, which turned pink. The conversation between the appellant and complainant (PW-3) as recorded in the Samsung digital recorder was heard at the spot, which confirmed the discussion between the complainant (PW-3) and appellant no. 1 about the sales tax matter and the settlement of bribe between them. The conversation recorded in the digital Samsung recorder was transferred to another cassette, which was sealed at the spot. In addition, another cassette was prepared for investigation purposes which were left unsealed. Thereafter, the search of tables of the three members of the audit party namely, appellant no. 1, appellant no. 2 and Amar Singh Rawat, senior auditor was taken. The files relating to complainant's firm were recovered from the possession of Amar Singh Rawat and the same were seized.

6. Subsequently, during investigation, the washes were referred to CFSL for chemical examination and the CFSL expert vide his report (Ex. PW-2/A) dated 25.06.2002 opined that washes gave positive test for phenolphthalein

and sodium carbonate. Further, the voice samples of appellant no.1, appellant no. 2, Amar Singh Rawat and complainant (PW-3) were sent to CFSL for comparison with the specimen voice samples. CFSL confirmed the similarity of questioned voice and specimen voice samples of appellant no. 1 and complainant (PW-3) with the voice in cassette in respect of linguistic and phonetic features on basis of auditory examination, and similarity in respect of formant frequencies distribution, intonation pattern, number of formants and other general visual features in voice grams on the basis of voice spectrographic examination vide Ex. PW-1/B.

7. Thereafter, the competent authority i.e. the Director General of Audit, Central Revenue, IP Estate, New Delhi, accorded sanctions under section 19 of the PC Act for prosecution of appellant no. 1 and appellant no. 2 vide Ex. PW-15/A and Ex. PW-15/B. After taking cognizance, both the accused were summoned and on appearance, they were supplied copies of charge sheet and documents. On 23.02.2004, the learned Predecessor of the Trial Court framed the charges against both the accused under section 120-B, IPC and under section 7 & 13(2) read with section 13(1)(d) of the PC Act, to which they pleaded not guilty, and claimed trial.

8. The prosecution examined 15 witnesses to prove its case. They are as follows:

PW-1 Dr. Rajinder Singh, PSO (Physics), CFSL, New Delhi.

PW-2 K.S. Chabra, SSO cum Assistant Chemical Examiner, CFSL.

PW-3 Rajpal Katyal (the complainant). He proved his complaint.

PW-4 Mann Singh (the independent shadow witness).

PW-5 Sachin Arora, Accountant with M/s. Kailash Engineering.

PW-6 Darshan Singh, Sales Tax Officer.

PW-7 Rakesh Kumar, Sole Proprietor, Shahdara Steel Rolling Mills (Firm which purchased the generator set from M/s. Kailash Engineers).

PW-8 S.S. Rana (the independent recovery witness).

PW-9 Mukesh Kumar, Value Added Tax Inspector (Sales Tax Inspector), Dept. of Sales Tax.

PW-10 Chander Mohan, Director Administration, Office of the Principal Director of Audit.

PW-11 Gurbachan Lal, Senior Audit Officer.

PW-12 Ajay Chandana, Junior Account Officer, Gurunank Dev Polytechnic.

PW-13 Inspector Amrik Raj, Economic Offences Wing, Crime Branch (the Investigating Officer).

PW-14 Umesh Vashishth, Inspector CISF (Raid Officer/ Trap Laying Officer).

PW-15 H.P. Dass, Chairman, State Administrative Tribunal Orissa (Sanctioning Authority of both appellant no. 1 and appellant no. 2).

9. The statement of the appellant no. 1 was recorded under Section 313, Cr.P.C. He claimed to be innocent and falsely implicated in this case. He further stated that:

“The case is false. The complainant Raj Pal Katyal did not submit the ST-I Form for getting the exemption from depositing the sale tax about Rs.7 lacs and he got the assessment order in his favour from the Sale Tax Officer knowing fully that if this fact came to the knowledge of any other authority i.e. auditor or superior officer of Sales Tax Officer who conducted the assessment, so he has been watching and following his file and when he came to know that there was likelihood that the said concealment of non depositing of ST-I Form upon which he got the exemption of Rs.7 lacs sales tax, so in order to save himself that no person could pass any order against him, he falsely lodged a complaint with the CBI against me and other members of the auditing party and falsely got involved in this case. The said file upon which the assessment order has been passed by the sales Tax Officer was likely to be sent for audit and the complainant knew that this concealment would not remain under the file and would come on the surface, so he got laid down a false trap and got me and Lala Ram falsely arrested in this case. I never demanded any illegal gratification from complainant Raj Pal Katyal because the said file never came to me and I did not raise any objection, so the dropping of the objection did not arise by me as mentioned in the sanction order. The complainant manipulated to keep the money under the Carpet in order to falsely implicate me because he knew that I would not accept the money because I had never demanded or agreed to accept the illegal gratification from him. Raj Pal Katyal had already falsely implicated one officer of Income Tax Department when he found that he was likely to be implicated in the evasion of income tax. He is very close to certain CBI officers as one of his close relative is in CBI who has helped him illegally and unlawfully in conducting the raid against me.”

10. The appellant no. 2 in the statement recorded under Section 313, Cr.P.C stated that he was innocent and that it was a false case.

11. The appellant no. 1 examined the following witnesses in support of his defence:

DW-1 Deepak Kumar, Senior Audit Officer.

DW-2 Madan Lal, UDC, Record Keeper, Sales Tax.

DW-3 L.S. Thakur, Senior Auditor.

DW-4 R.S. Sharma, Audit Officer.

DW-5 D.R. Raja, Senior Audit Officer.

DW-6 Neksay Lal, Senior Audit Officer.

However, the appellant no. 2 did not lead any evidence in his defence.

12. The Trial Court on an analysis of the evidence came to the conclusion that the case against the appellant no. 1 and appellant no. 2 had been proved by the prosecution beyond reasonable doubt and, thus, convicted the appellants.

Submissions on behalf of Girwar Singh Appellant no.1:

13. Mr. Mittal, learned senior counsel, appearing for appellant no. 1, submits that there are contradictions in the statements of the complainant (PW-3), rendering his testimony unreliable. The complainant (PW-3) in the examination-in-chief, *inter alia*, stated that:

“On 31.05.2002, I personally met both the accused, who are present in the court today (Correctly identified). I showed my inability to pay Rs.40,000/- and on my request they reduced the amount to Rs.30,000/- and further told that this could not be reduced. I was directed to pay the settled amount of Rs.30,000/- on 3.6.2002. I asked the accused persons if I could not arrange the amount then I was told that whatever amount I could arrange, the same should be paid.”

14. However, the complainant (PW-3), in his cross-examination, stated as follows:

“I did not ask for Lala Ram in room No.902 and I asked for Girwar Singh only. I talked to Girwar Singh only. I had interaction with Lala Ram in CBI office for a minute.”

15. Mr. Mittal submits that it is evident from the statements of the complainant (PW-3) that there is a contradiction with regard to the presence of appellant no. 2 when he allegedly had conversation regarding the demand and negotiation of the bribe amount. The complainant (PW-3), earlier deposed that both the appellants were present when the demand was made, however, in his cross examination, he stated that he only enquired about appellant no. 1 and had conversation with appellant No. 1. Therefore, it raises a doubt whether there was any demand for bribe, and by whom was it demanded. He submits that there is no evidence of demand by the appellant no.1. Learned senior counsel submits that the proof of demand is a *sine qua non* to constitute the offences in question. In this regard, he places reliance on **Banarasi Dass v. State of Haryana**, (2010) 4 SCC 450, **Rakesh Kapoor v. State of Himichal Pradesh**, (2012) 13 SCC 552, **State of Punjab v. Madan Mohan Lal Verma**, AIR 2013 SC 3368, **B. Jayaraj v. State of A.P.**,

2014 (13) SCC 55, *Ashish Kumar Dubey v. State thr. C.B.I.*, 2014 (142) DRJ 396.

16. Learned senior counsel submits that as per the examination in chief of the complainant (PW-3), it is clear that there was no demand by appellant no. 1 even on 03.06.2002. The complainant (PW-3) states that after he reached the sales tax office along with Sachin Arora (PW-5), he introduced himself and informed the appellants that he could arrange Rs. 20,000/- and thereafter, he handed over the bribe money to appellant no. 1. Thus, in the light of the statement of the complainant (PW-3), it stands established that there was no demand by the appellant no. 1. Even according to the statement of the complainant (PW-3) the money was allegedly handed over without there being any demand.

17. Learned senior counsel submits that as per the testimony of the shadow witness (PW-4), there was no demand by appellant no.1, and there was only acceptance. In this regard, the statement of the shadow witness (PW-4) is relied upon which is as follows: “*Mr. Katyal sat in front of Mr. Girwar Singh, accused present in the Court (correctly identified). They were talking about some case and after some time Mr. Katyal gave the tainted GC notes to Mr. Girwar Singh.*” He submits that since demand is an essential ingredient for constituting an offence under PC Act, in the absence of demand, the appellants cannot be convicted for the offence.

18. Learned senior counsel for the appellant no.1 submits that the shadow witness (PW-4) had earlier been a witness in a CBI raids. In this regard, shadow witness (PW-4) stated that “*I have joined 2-3 CBI raids as a*

witness.” Being a stock witness of the CBI, the statement of the shadow witness cannot be relied upon as an independent witness. In this regard, he places reliance on ***Pyare Lal v. State***, (2008)149 DLT 425 and ***G.V. Nanjundiah v. State (Delhi Administration)***, 1987 Supp. SCC 266.

19. Learned senior counsel submits that the digital tape recorder, which was used to record the questioned conversation was neither produced before the Court, nor it was examined. No certificate under section 65B, Indian Evidence Act, 1872 was produced with respect to the transcript memo (Ex. PW-3/F) prepared from the conversation. Placing reliance on ***Rakesh Kumar & Ors. v. State***, 2009 (163) DLT 658, learned senior counsel submits that the computer generated electronic records is admissible at a trial only if proved in the manner specified by Section 65B of the Evidence Act. He submits that the recorded conversation was full of disturbance and most of it was not clear. In this regard, the complainant (PW-3), in his cross examination, stated that “*It is correct that there is lot of disturbance in the cassette played today... .. There was no noise in room No.902 but there was noise in surroundings.*”

20. Mr. Mittal submits that as per the statement of the TLO (PW-14), the original recording was transferred into two cassettes, out of which one was sealed and the other was not sealed and the original recording was deleted. Therefore, tampering with the cassette cannot be ruled out and the same is not admissible in the court. In this regard, he places reliance on ***Ram Singh & Ors. v. Col. Ram Singh***, (1985) Supp SCC 611, wherein the Supreme Court held that the tape recording conversation cannot be relied upon if there are lots of disturbance in the cassette played before the court, and the

possibility of tampering cannot be ruled out. Further, the complainant (PW-3) stated that *“It is also correct that the said conversation was transferred in a blank cassette which was sealed at the spot and its wrapper was signed by us.”* Hence, there is inconsistency as the complainant does not talk about the recording being transferred into two cassettes, creating a doubt as to whether the recording was transferred at all, or not. Even the shadow witness (PW-4) does not support the prosecution case with regard to the transfer of the recording to two cassettes.

21. Mr. Mittal submits that it is evident from the statement of the complainant (PW-3) that a portion of the recording is inaudible. Further, in the portions audible, only the voice of the complainant (PW-3) can be heard talking. Nothing in the conversation in cassette has been attributed to appellant no. 1. He submits that from the testimony of the complainant (PW-3) –with respect to the recording of the cassette, the transaction between the complainant (PW-3) and appellant is inconclusive.

22. Learned senior counsel submits that there is contradiction qua the date of recording of the specimen voice. The complainant (PW-3) in his examination-in-chief, *inter alia*, stated that *“I was again called in the CBI office where specimen voice of myself and Girwar Singh were recorded and a memo was prepared in respect of sealing the cassette. The memo is Ex. PW 3/F bearing my signature at point-A.”* Further, in his cross examination he stated that *“it is correct that on the day of raid, my specimen voice or that of accused Girwar was not recorded. It was recorded on 5th only.”* However, as per the Specimen voice recording memo (Ex. PW-3/H), the recording of the specimen voice was done on 25.07.2002. This is also corroborated by the

statement of the I.O. (PW-13). The I.O. (PW-13) stated that “*I also recorded the specimen voice of the accused Girwar Singh and the complainant Rajpal Katiyal in the presence of independent witnesses Sh. Mann Singh and Sh. SS Rana on 25.7.02.*”. Thus, there is material contradiction in the statement of the complainant (PW-3) and Insp. Amrik Raj, I.O. (PW-13), read with (Ex. PW-3/H).

23. Moreover, the shadow witness (PW-4) in his cross examination, *inter alia*, stated that “*Perhaps specimen voice of accused No. 1 was recorded in CBI office on the day of raid but it was not recorded at the spot. I do not remember if specimen voice of complainant was recorded at the spot or in the CBI office on that day.*” The shadow witness (PW-4) also does not support the statement of the complainant (PW-3) with respect to the date of recording of specimen voice.

24. Learned senior counsel submits that in view of the contradiction in the statements of the shadow witness (PW-4) & I.O. (PW-13), with regard to the sealing of the cassette, there was a possibility of tampering with the samples. The shadow witness (PW-4) deposed that after hearing the conversation, it was transferred in a blank cassette, which was thereafter sealed and signed at the spot. However, the I.O. (PW-13) in his re-examination, *inter alia*, stated that “*I state that the transcription was prepared after listening the investigation copy of the cassette recorded on 3.6.2002 of the conversation between Sh. Rajpal Katiyal and Girwar Singh. This Memo was prepared and signed by me. The investigation copy of the cassette was not in sealed condition. I was a little bit confused as I had thought that the Ld. Defence Counsel is asking about the cassette used for recording the specimen voice.*”

He submits that it is clear from the statement of the Insp. Amrik Raj, I.O. (PW-13) that the transcription was prepared after opening the seal of the cassette, and without taking permission of the court to open the seal. Further, the Insp. Amrik Raj, I.O. (PW-13) admitted that “*I did not inform the CFSL Authority regarding the breaking of the seal of the cassette from which I prepared the transcription.*” Consequently, the cassette cannot be relied upon, as there is grave possibility of the samples having been tampered with.

25. Another submission of learned senior counsel is that the Insp. Amrik Raj, I.O. (PW-13) admitted that he did not file the investigation copy of the cassette on the record along with the charge-sheet.

26. Learned senior counsel submits that the T.L.O. (PW-14) stated that after taking the digital recorder from the complainant (PW-3), it was heard and thereafter, Sub Inspector Prem Nath transferred the conversation into a cassette. However, neither Prem Nath was produced as a witness before the court nor any statement was recorded under section 161, Cr.P.C. to the effect that he transferred the conversation into a cassette from digital recorder.

27. Mr. Mittal submits that there is no provision regarding taking of voice sample. He submits that the scope of section 311A, Cr.P.C. is with regard to the power of the magistrate to give specimen for signature or handwriting for the purposes of any investigation. Thus, there is no provision for taking the specimen of voice sample. In this regard, reliance is placed on ***Rakesh Bisht v. CBI***, 2007 (2) AD (Delhi) 23 and ***Ritesh Sinha v. State of Uttar Pradesh & Anr.***, (2013) 2 SCC 357. Further, he submits that due to the

difference of opinion of the courts, the matter has been referred to a larger bench.

28. Mr. Mittal submits that motive and demand are the basis of a case under the PC Act. He submits that the allegation of the complainant (PW-3) in the complaint (Ex. PW-3/A) is that the accused/appellant no.1 refused to accept documents, unless the bribe was paid. The complainant (PW-3) in his cross examination stated that *“It is correct that ST-1 form was deficient in that file.”* Further, he stated that *“It is correct that the ST-1 form was never issued in my favour by the purchaser of the generator.”* Thus, it cannot be the case that the bribe was being demanded to hush up the ST-1 form.

29. Learned senior counsel submits that there was contradiction in the statement of the complainant (PW-3) made during his cross examination and his statement recorded under section 161, Cr.P.C (Ex. PW-3/DA). The complainant (PW-3), in his cross-examination, *inter alia*, stated as follows:

“I did not state before CBI that accused No. 1 was challenged for demanding and accepting Rs.30,000/-. (Confronted with portion-A to A statement Ex. PW-3/DA where it is so recorded).”

30. However, complainant (PW-3) in his statement recorded under section 161, Cr.P.C. (Ex. PW-3/DA), stated that *“You challenged the accused persons as together they had demanded and accepted bribe of Rs. 30,000/- from me. On this the accused became confused and kept mum.”* He states that under the Proviso to Section 162, Cr. P.C. such statements recorded under Section 161, Cr.P.C. can be used only for the purpose of contradicting a prosecution witness in the manner indicated in Section 145,

Evidence Act, and for no other purpose. Thus, the previous statement of a witness can be used by the accused for the limited purpose mentioned in Section 162 of the Code as provided for in Section 145 of the Evidence Act. Consequently, it would not be safe to rely on the statement of the complainant (PW-3) as his statements are contradictory and all other witnesses have turned hostile.

31. Ld. Senior Counsel submits that the shadow witness (PW-4) in his testimony deposed that he did not know, if one person with the name of Sachin Arora (PW-5) was present at the time of meeting the appellant. Thus, it creates doubt about the presence of the accountant Sachin Arora (PW-5) at the time of the transaction.

32. Another submission of Mr. Mittal is that there was a leading question put to the shadow witness (PW-4). The shadow witness (PW-4), in reply to a leading question, states:

“It is correct that while extending the bribe amount towards Girwar Singh, the complainant told Girwar Singh that he could arrange only Rs.20,000/- and remaining amount will be delivered soon through the person accompanying him”

33. He submits that leading questions cannot be put to the witness by the prosecution. Thus, the fact that a conversation regarding the payment of the remaining bribe amount later took place between the complainant (PW-3) and appellant no.1 cannot be used in evidence against the appellant no.1.

34. Mr. Mittal submits that Sachin Arora (PW-5) does not support the case of the prosecution. Sachin Arora (PW-5), in his cross examination, *inter alia*, stated:

“It is incorrect to suggest that after brief discussion about the case, Mr. Katyal handed over the bribe amount to Girwar Singh who accepted the same with his right hand and after counting the same with both hands, kept the same in his left hand. (Confronted with portion K to K where it is so recorded).”

35. Sachin Arora (PW-5) denied that any such transaction took place between the complainant (PW-3) and the appellant. Thus, the testimony of Sachin Arora (PW-5) does not support the prosecution’s case.

36. Learned senior counsel submits that the statement of the recovery witness (PW-8) with regard to the transaction between the complainant (PW-3) and appellant no. 1 would fall within the purview of rule of hearsay evidence. The recovery witness (PW-8) stated that:

“Sh. Mann Singh, shadow witness also again entered in the room along with the raiding party after giving the signal. Inspector Vashishth inquired from Sh. Raj Pal Katyal and Sh. Mann Singh about the transaction of bribe money and the conversation which took place between Sh. Raj Pal Katyal and the accused. Sh. Raj Pal Katyal and Sh. Mann Singh both disclosed to Inspector Vashishth that accused Girwar Singh had accepted bribe money in his right hand and thereafter he counted the same with both hands. Sh. Raj Pal also disclosed that after accepting the bribe money, accused Girwar Singh had bent towards one side while remained sitting on his chair.”

37. The TLO (PW-14) deposed that he inquired from the shadow witness (PW-4) regarding the transaction of the bribe, and the shadow witness (PW-4) informed that after the discussion with appellant no. 1, appellant no.1 accepted the bribe money from the complainant (PW-3) from his right hand and counted them with both his hands and kept them in his left hand. The

TLO (PW-14) further deposed that he was informed by the complainant (PW-3) that while he was giving a miss call, the appellant no. 1 bent towards his left side and when he sat on the chair, the bribe amount was not in his hands. Thus, the statement of the recovery witness (PW-8) and TLO (PW-14) being hearsay evidence, are not admissible in evidence. Further, neither the complainant (PW-3), nor shadow witness (PW-4), who were present inside the room when the transaction took place, stated in their depositions that appellant no. 1 bent down to place the bribe money.

38. The shadow witness (PW-4) in his statement stated that *“It is incorrect to suggest that after accepting the (sic.) bribe amount, accused Girwar Singh counted the same with his both hands and after that kept the same in his left hand.”* The shadow witness does not support the prosecution case that the appellant no. 1 accepted the bribe money and thereafter, counted the same.

39. Learned senior counsel submits that as per the statement of the shadow witness (PW-4), the search was made for the tainted notes, which was finally recovered under the carpet from the portion just under the chair of the appellant no. 1. He submits that it was not possible that during the process of search, the notes were recovered from the chair underneath.

40. Learned senior counsel submits that the complainant (PW-3), in his testimony, has nowhere stated that he saw the appellant no. 1 leaning towards the left and concealing the bribe money, or he informed the I.O. (PW-13) regarding the fact that the money was concealed by leaning. However, the recovery memo (Ex. PW-3/E) states that *“The complainant*

also confirmed the same version of shadow witness and further added that while he was busy in giving signal on CBI cell phone through his mobile, he saw the accused Shri Girwar Singh leaning towards his left side and concealed the bribe amount as the same was not seen in his hands later.”

Further, the shadow witness (PW-4), in his cross examination, stated that there could be a possibility that the complainant (PW-3) told the CBI that the appellant no. 1 leaned and concealed the bribe amount. Thus, there is contradiction qua the fact that whether the complainant (PW-3) knew about the concealment of the bribe amount by leaning, or not.

41. Learned senior counsel submits that Sachin Arora (PW-5) did not support the case of the prosecution. Sachin Arora (PW-5) in his cross examination denied that the bribe amount was accepted by appellant no. 1 in his presence and thereafter he concealed it. He denied that he was present at the time of the post trap proceedings. He denied that his signatures are present on the recovery memo (Ex. PW-3/E). He further denied that the bribe money was recovered from underneath the carpet, and that the hand washes were conducted in his presence. Thus, the testimony of Sachin Arora (PW-5) cannot be relied upon.

42. On the aspect of recovery, learned senior counsel submits that it is clear from the statements of the complainant (PW-3), shadow witness (PW-4), recovery witness (PW-8) and the TLO (PW-14) that the bribe amount was not recovered from the appellant, but from underneath the carpet under the chair of appellant no. 1. Therefore, it cannot be construed that the recovery is established, and appellant no.1 was in possession of the GC notes. In this regard, reliance is placed on *Suraj Mal v. State (Delhi*

Administration), (1979) 4 SCC 725, *M.K. Harshan v. State of Kerala*, (1996) 11 SCC 720, *C.M. Girish Babu v. CBI, Cochin, High Court of Kerala*, (2009) 3 SCC 779.

43. Learned senior counsel submits that the TLO (PW-14), in his deposition stated that after searching for the bribe amount at other places, the shadow witness (PW-4) informed that the bribe money was found under the carpet. In this regard, the TLO (PW-14) stated that:

“The drawer of the table of the accused was searched but the bribe money was not found. Thereafter search of other places around the table of the accused were conducted and during the search, the independent witness Sh. Mann Singh informed that the bribe money was kept under the Carpet on the floor of the office room, towards the left side of the accused Girwar Singh.”

44. However, the shadow witness (PW-4) has nowhere stated in his testimony stated that he informed about the bribe money being kept under the carpet.

45. Learned senior counsel submits that there is inconsistency between the statement of TLO (PW-14) and the complainant (PW-3) with regard to the moving of chairs and tables to recover the bribe money. The complainant (PW-3) stated that *“It is correct that certain articles like furniture drawer etc. were moved to find out where the money has been kept and money was not recovered from drawer.”* However, the TLO (PW-14) stated as follows:

“It took about 10 minutes to me in checking the drawers of the table of the accused Girwar Singh.

... ..

So far as I remember there were some damages in the carpet and without removing table and chair, the tainted money was recovered under the carpet.”

46. Thus, there is inconsistency in the statements of the TLO (PW-14) and the complainant (PW-3) qua the movement of furniture, etc. to recover the bribe amount from the carpet.

47. Learned senior counsel submits that as per the testimony of the recovery witness (PW-8), he did not search for the bribe money. He further stated that the carpet was 8” x 10”. However, there is contradiction with regard to the area which was covered by the carpet as the other witnesses stated that the carpet was wall to wall. Learned senior counsel submits that the site plan (Ex. PW-4/A), is only a corroborative piece of evidence, and not substantive evidence. He submits that the dimensions have not been mentioned in the site plan and it is not even clear whether it has been prepared by the I.O. or not. The table and chairs have also not been shown or marked in the site plan.

48. Mr. Mittal submits that the complainant (PW-3) stated that the portion of the carpet from where the tainted amount was recovered, was also seized. However, none of the other witnesses deposed that piece of the carpet was cut out.

49. Learned senior counsel submits that the shadow witness (PW-4) does not remember if the portion of the carpet from where money was recovered, was also taken. He submits that during cross examination, the shadow witness (PW-4) did not remember as to who had cut the carpet, and what cutting instrument was used.

50. The recovery witness (PW-8) in his statement stated that the bottle Ex. P-3 contained very less, approximately 10 teaspoons of lightest pink colour solution. Even Ex. P-2 contained lightest pink colour solution. Thus, it creates doubt regarding the presence of phenolphthalein powder.

51. Learned senior counsel submits that the sanction order (Ex. PW-15/A) does not show that the sanctioning authority has applied his mind while granting the sanction. He submits that, firstly, the sanction order is incomplete, as mere demand of the appellant is not sufficient, as it does not show that there was acceptance or recovery of the gratification amount of Rs. 20,000/- by the appellant no.1. Further, the sanction order (Ex. PW-15/A) is for the bribe amount of Rs. 30,000/- which shows that there is no application of mind by the sanctioning authority (PW-15).

52. Mr. Mittal submits that from the testimony of Deepak Kumar Gupta (DW-1), it is established that appellant no. 1 did not have any file pertaining to the complainant (PW-3). Deepak Kumar Gupta (DW-1), *inter alia*, stated that “*The summoned record i.e. file of alleged objections raised by Girwar Singh on the file of M/s. Kailash Engineering is not in our office. ... In this file, there is no document or photocopy showing raising of objection by Girwar Singh.*” Thus, the appellant did not have the file pertaining to the complainant.

Submissions on behalf of Lala Ram – appellant no.2:

53. Mr. Tanveer Ahmed Mir, learned counsel appearing for appellant no. 2 submits that in the case of Amar Singh Rawat – the third person who was present in the room when the transaction happened, the sanctioning authority

initially refused to accord sanction to prosecute him. However, the sanction was accorded qua him later, but the trial court discharged him. He submits that the role of appellant no. 2 is at par with Amar Singh Rawat and, therefore, the appellant no. 2 should be discharged from the charges as well.

54. Learned counsel submits that no demand has been established by/against appellant no. 2, and neither was there any acceptance or recovery from the appellant no. 2. He further submits that no voice recording of the appellant no. 2 was found in the recorded conversation. Therefore, the appellant no. 2 cannot be charged with conspiracy for obtaining gratification from the complainant (PW-3).

55. Learned counsel submits that although a phone call was received from sales tax office on 23.05.2002, Sachin Arora (PW-5) nowhere mentions in his statement from 'whom' the call was received. Further, Sachin Arora (PW-5) denied that when he visited the Sales Tax Office on 27.05.2002, he met appellant no. 2 and that demand for bribe was made at that time.

56. Learned counsel submits that the demands allegedly made by the appellant No.2 on 25.07.2002 and by appellant No.1 on 30.05.2002 for bribe of Rs.15,000/- and Rs.40,000/- respectively are not established as they are hearsay evidence of the complainant PW-3. These demands were allegedly made to Sachin Arora (PW-5), who had turned hostile. He has referred to the examination-in-chief of PW-3, the complainant, wherein he, *inter alia*, stated:

“On 31.5.2002, I personally met both the accused, who are present in the court today (Correctly identified). I showed my inability to pay Rs.40,000/- and on my request they reduced the

amount to Rs.30,000/- and further told that this could not be reduced. I was directed to pay the settled amount Rs30,000/- on 3.6.2002. I asked the accused persons if I could not arrange the amount of Rs.30,000/- then I was told that whatever amount I could arrange, the same should be paid.”

57. Learned counsel submits that the statement of PW-3 does not show that on 31.05.2002 any demand was raised by the two accused. The complainant on his own accord claims to have offered to pay the amount to the accused.

58. Learned counsel submits that Sachin Arora (PW-5), who allegedly was dealing with appellant no. 2, turned hostile, and did not support the case of the prosecution. Further, the shadow witness (PW-4) does not implicate appellant no. 2 in his statement. The shadow witness (PW-4) stated that the complainant (PW-3) spoke to appellant no. 1 before the tainted notes were handed over to him.

59. Learned counsel submits that on a perusal of the CFSL report of the audio recording, it is clear that nothing incriminating was found qua the appellant no. 2.

60. Learned counsel for appellant no. 2 placed reliance on the following judgments:

- i. ***State of Punjab v. Madan Mohan Lal Verma***, AIR 2013 SC 3368.
- ii. ***B. Jayaraj v. State of A.P.***, JT 2014 (7) SC 381.
- iii. ***Surinder Kaur v. State of Haryana***, 2014 (10) SCALE 716

Submissions on behalf of the CBI:

61. On the other hand, learned counsel for the CBI fully supports the judgment and order of the trial court. He submits that there was demand for bribe by the appellants. The complainant (PW-3) in his deposition stated that:

“On 31.05.2002, I personally met both the accused, who are present in the court today (Correctly identified). I showed my inability to pay Rs. 40,000/- and on my request they reduced the amount to Rs. 30,000/-and further told that this could not be reduced. I was directed to pay the settled amount of Rs. 30,000/- on 3.6.2002. I asked the accused persons if I could not arrange the amount of Rs. 30,000/- then I was told that whatever amount I could arrange, the same should be paid.”

(Emphasis supplied)

62. Thus, the essential ingredient of demand by the appellant no. 2 stands established.

63. Mr. Mann, learned standing counsel for CBI submits that the complainant (PW-3) has deposed and proved that on 31.05.2002 he visited the office of the Sales tax at 9th Floor and personally met both the appellants and showed his inability to pay 40,000/- which was reduced to Rs. 30,000/- with the direction to pay on 3.6.2002. PW-3 corroborated the demand by his contemporaneously made written complaint (PW-3/A), wherein he specifically mentioned about the demand of bribe money by both the appellants. PW-3 proved the pre-raid proceedings and preparation of handing over memo (Ex. PW-3/B), annexure to handing over memo (Ex. PW-3/B), handing over of tape recorder memo (Ex. PW-3/D) and his

signatures on the same. PW-3 further proved that trap, acceptance of illegal gratification of Rs. 20,000/- by the appellant Girwar Singh, and recovery of the same by the independent witnesses. PW-3 has also proved the post-raid proceedings/Recovery vide Ex. PW-3/E, transcript cum voice identification memo (Ex. PW-3/F), the transcription (Ex. PW-3/G), and the specimen voice recording memo (PW-3/H), and his signatures on the same. PW-3 has proved the transcription (Ex. PW-3/G) and also identified his and voice of the accused Girwar Singh. This fact is further corroborated by the testimony of Rajinder Singh (PW-1), his report is Ex. PW-1/A and Ex. PW-1/B, wherein he gave opinion that the questioned voice in questioned cassette is that of Girwar Singh. He has proved the left hand wash of the accused and the carpet wash, which turned pink. PW-3 also proved the GC notes Ex. P-1 to P-40. He submits that the aspect of demand, acceptance and recovery of money has been proved from the statement of PW-3, and other circumstances which clearly pointing out the complicity of the appellants in the crime.

64. Mr. Mann submits that PW-5 has admitted to his visits to the Sales tax office on two occasions and talk of some settlement. Though PW-5 has not supported the specific demand by the appellants, but the subsequent circumstances that the complainant met both the appellants who reiterated the demand and reduced the same from Rs. 40,000/- to Rs. 30,000/- support the case of the prosecution that demand/agreement to accept Rs. 30,000/- as bribe, and acceptance of Rs. 20,000/- by Girwar Singh was part of the conspiracy, and the amount was accepted by Girwar Singh himself and the appellant Lala Ram. Reliance is placed on *D. Velayutham v. State*

Represented by Inspector of Police, Salem Town, Chennai, 2015 (12) SCC 348, wherein the Supreme Court has observed in para 15:

*“15. Though this Court has stressed the need and significance of phenolphthalein as a trap device in corruption cases, so as to allay doubts about the actual receiving of bribes by accused persons, there may be cases where there are multiple demanders in a common or conjoint bribe demand, and for whatsoever reason, only one receives the sum on their behalf, and is entrapped in consequence. Depending on strength of the remainder of evidence, in these cases, constructive receipt by co-accused persons is open to establishment by the prosecution, in order that those who intermediately obtain bribes be latched with equal culpability as their co-accused and entrapped receivers. This will, of course, discount those cases where the trap is successful only against one and not the other official, the latter having refused to accept the bribe tendered. In this case, the trap would have clearly failed against such an official, and there could be no question of the application of constructive receipt. If the receipt and handling of bribe money by Accused 2 so convincingly and inexorably points towards his custodianship of part of the same bribe amount on behalf of his superior officer, namely Accused 1, then Accused 1 cannot rely on mere non-handling/non-receipt of the bribe money, as his path to exculpation. **This Court's construal of anti-corruption cases is sensitive even to these byzantine methods of bribe-taking, and where an evader escapes a trap, constructive receipt has to be an alternate means of fastening criminal culpability.**”*

(Emphasis supplied)

65. Learned counsel submits that Sachin Arora (PW-5), in his examination in chief, *inter alia*, stated:

“When I met the officer alongwith the papers who telephoned in our office, he refused to accept the paper saying that first of

all some settlement has to be done by us and only then the papers will be accepted. I told that officer that only my boss could settle as he was the final authority. Thereafter I informed about the talks to my boss who told me that I should have asked about the terms of settlement. I again met that officer who directed me to send my boss and I conveyed the same to the boss. After 2-3 days my boss Sh. Rajpal Katyal directed me telephonically to come with files to Sales Tax Office. When i met Mr. Katyal in STO, I found one person accompanying him and we all the three went inside the office room of audit department where we met two-three persons.”

66. He submits that Sachin Arora (PW-5) was not cross examined by the appellant on this aspect and, therefore, this portion of the statement can be relied upon by the prosecution. Thus, from the statement of Sachin Arora (PW-5), it stands corroborated that the officer refused to accept papers as some settlement has to be done and further that he accompanied the complainant (PW-3) & another person to the office room of the audit department.

67. Learned counsel submits that no suggestion was put to the complainant (PW-3) in his cross examination that he did not visit the office of sales tax on 31.05.2002. Thus, it stands established that the complainant (PW-3) went to sales tax office.

68. Mr. Mann submits that the shadow witness (PW-4) – who is the independent witness, has supported the case of the prosecution. Further, the complaint of the complainant (PW-3) has been supported by the statements of the independent shadow witness (PW-4), and the recovery witness (PW-8), and also by the TLO (PW-14).

69. With regard to the presence of phenolphthalein on his hands and the piece of carpet under which the bribe amount was found, learned counsel submits that appellant no. 1 did not explain this incriminating evidence against him in his statement under Section 313 Cr.P.C. When the appellant no. 1 was questioned vide Q. 31, regarding the hand wash turning pink in the colourless solution of sodium carbonate, in his statement recorded under section 313 Cr.P.C., he made bald denials that the pink washes have been falsely prepared to falsely implicate him. However, no explanation has come forth from appellant no. 1.

70. Learned counsel submits that appellant no. 1 in his statement recorded under Section 313 Cr.P.C. stated that it is correct that he was the head of party no. 10 along with the co-accused i.e. appellant no. 2 and Amar Singh Rawat for the period 30.04.2002 to 27.05.2002. Thus, it proves that the appellants were in the audit team involved in the audit of the complainants firm.

71. Learned counsel places reliance on Explanation (d) to Section 7, PC Act to submit that it is not necessary that the public servant should actually do, or should be capable of doing the act for which bribe may be demanded.

72. Mr. Mann submits that K.S. Chabra (PW-2), who was the Assistant Chemical Examiner, CFSL in his examination in chief stated that “*On chemical analysis all the exhibits gave positive tests for phenolphthalein and sodium carbonate*”. Further, the CFSL report (Ex. PW-2/A) tested positive for the presence of phenolphthalein and sodium carbonate. Under section

293, Cr.P.C. the report of the chemical/ Assistant chemical examiner is good evidence.

73. On the aspect of sanction, learned counsel submits that the appellants have not shown what failure of justice has taken place, even if it is assumed that sanction granted to the appellant is irregular. In this regard, reliance is placed on *C.S. Krishnamurthy v. State of Karnataka*, 2005 (4) SCC 81.

74. Learned counsel submits that with regard to the transcript (Ex. PW-3/G), section 65B, Evidence Act is not applicable in this case to the memos. The transcripts have only been typed in the computer and have not come into existence on the computer like an email or digitally signed document. In this regard, reliance is placed on *Anvar P.V. v. P.K. Basheer & Ors.*, (2014) 10 SCC 473.

75. I have heard learned counsels, perused the record and considered the submissions and evidence recorded in the case.

Regarding the validity of Sanction:

76. H.P. Dass, Chairman, State Administrative Tribunal, Orissa (PW-15), was the authority competent to remove appellant no. 1 and appellant no. 2 from service and he accorded the sanction for prosecution of both the accused for the alleged offence. Learned counsels for the appellants contended that there was no application of mind by the sanctioning authority (PW-15) while according the sanction.

77. Section 19(3), PC Act reads as follows:

“(3) Notwithstanding anything contained in the Cr.P.C., 1973,-

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.”

78. Thus, there must a failure of justice caused to the accused due to the irregularity in the sanction order. The Sanctioning Authority (PW-15) has specifically stated in his deposition that after carefully examining the material on record including documents and statement of witnesses under Section 161 Cr.P.C, he has accorded sanction for the prosecution of the appellants. In **C.S. Krishnamurthy** (supra), the Supreme Court held as follows:

“9. Therefore, the ratio is sanction order should speak for itself and in case the facts do not so appear, it should be proved by leading evidence that all the particulars were placed before the sanctioning authority for due application of mind. In case the sanction speaks for itself, then the satisfaction of the sanctioning authority is apparent by reading the order. In the present case, the sanction order speaks for itself that the incumbent has to account for the assets disproportionate to his known source of income. That is contained in the sanction

order itself. More so, as pointed out, the sanctioning authority has come in the witness box as witness No. 40 and has deposed about his application of mind and after going through the report of the Superintendent of Police, C.B.I. and after discussing the matter with his legal department, he accorded sanction, it is not a case that the sanction is lacking in the present case. The view taken by the Additional Sessions Judge is not correct and the view taken by learned single Judge of the High Court is justified.”

(Emphasis Supplied)

79. The Sanctioning Authority (PW-15) has denied in his cross examination that he granted sanction for prosecution mechanically without application of mind, or without knowing the true facts of the case. Further, with regard to the bribe amount being mentioned as Rs. 30,000/-, the sanctioning authority (PW-15) has stated that *“The facts mentioned in the Sanction Orders were noted from the file maintained in the office.”* The sanction order mentions the demand for bribe of Rs. 30,000/-, as the demand by the appellant no. 1 was for the aforesaid amount. The complainant (PW-3) has stated in his examination in chief that he informed the appellants that he could only arrange Rs. 20,000/- and the balance amount would be paid later on. Thus, the sanctioning authority (PW-15) had correctly mentioned in his sanction order that an amount of Rs. 30,000/- had been demanded from the complainant (PW-3), as the appellants on 31.05.2002 agreed to accept that amount.

80. Further, it is settled law that the irregularity in granting sanction would be of significance if there was failure of justice as a consequence of it (See *Paul Varghese v. State of Kerala & Anr.*, (2007) 14 SCC 783). In the

present case, the appellant has failed to show that there was failure of justice due to grant of sanction by H.P. Dass (PW-15).

81. In view of the above discussion, the submission of the appellant that the sanctioning authority did not apply his mind in according sanction is rejected.

On Merits:

82. On the aspect of demand, the complainant (PW-3) in his examination is chief, *inter alia*, stated that:

“On 31.05.2002, I personally met both the accused, who are present in the court today (Correctly identified). I showed my inability to pay Rs.40,000/- and on my request they reduced the amount to Rs.30,000/- and further told that this could not be reduced. I was directed to pay the settled amount of Rs.30,000/- on 3.6.2002. I asked the accused persons if I could not arrange the amount then I was told that whatever amount I could arrange, the same should be paid.”

83. In his cross examination, he stated that:

“First I visited room No. 902 on 31.5.2002 and at that time there was sitting arrangement for four officials and three were present out of them two officers were present on their seat and one person sitting opposite them on visitor’s seat and two seats of officials were vacant. I did not ask for Lala Ram in room No.902 and I asked for Girwar Singh only. I talked to Girwar Singh only.”

84. The statement of the complainant (PW-3) establishes that a demand was made for the bribe money for some settlement. The complainant was given the information of demand by his accountant Sachin Arora (PW-5)

since the accountant was the first person to whom the initial demand was made. Sachin Arora (PW-5) was declared a hostile witness during the trial. He denied the demand made by the appellants. However, the examination in chief of Sachin Arora (PW-5) is relevant, as it corroborates the version of the complainant (PW-3) and facts in the complaint (Ex. PW-3/A). In his examination in chief, he stated that he went to the sales tax office and met an officer, along with the papers. The officer refused to accept the papers stating that first, a settlement has to be done and then the papers will be accepted. He informed the complainant (PW-3) regarding the conversation with the officer. He (i.e. PW-5) again met the officer, who directed him to send his boss, i.e. the complainant (PW-3). He conveyed this to the complainant (PW-3). He also stated that on the day of raid proceedings, the complainant (PW-3) was accompanied by another person and then they went inside the office.

85. In *Koli Lakhmanbhai Chanabhai v. State of Gujarat*, AIR 2000 SC 210, *Sat Paul v. Delhi Administration*, AIR 1976 SC 294 and *Shyamlal Ghosh v. State of West Bengal*, AIR 2012 SC 3539, the Supreme Court has held that the testimony of a hostile witness is not liable to be wholly rejected, and can be relied upon to the extent that it supports the version of the prosecution. It was further held that conviction can be based on such a testimony, if corroborated by other reliable evidence. Therefore, testimony of Sachin Arora (PW-5) cannot be wholly rejected, and the same is relevant where it corroborates with the testimony of other witnesses.

86. Further, the statement of the complainant (PW-3) is consistent with the complaint (Ex. PW-3/A) made to the CBI. The relevant portion of complaint (Ex. PW-3/A) recorded is as follows:

“on 31/5/2002 i.e. next day I personally visited sales tax office to verify the facts and in Room No 902 I met Sh. Girwar Singh (Sr Account officer) and Sh. Lala Ram (Assistant Account officer) in the afternoon and enquired about the case of our firm. Both of them informed that the matter has been explained to my Accountant the previous day and Sh. Girwar Singh told that the amount to settle the things has also been already been intimated to Sachin Arora. I expressed my inability to pay such a huge amount on which Sh. Girwar Singh reduced the same to Rs. 30,000/- by stating that the amount cannot be reduced further as the same has to be shared by other members of his team. He asked me to pay the bribe amount by Monday i.e. 3/6/2002.”

87. Thus, it stands established that the complainant (PW-3) was called to the sales tax office regarding some settlement. The demand for illegal gratification was made by the appellants to settle the matter against the complainant (PW-3). The stand of the complainant (PW-3) is consistent and natural in his complaint and as a witness in court. His stand even in cross examination stood unimpeached. The submission of the learned senior counsel that there is a contradiction qua the presence of appellant no.2 at the time of demand also does not hold ground. The statements of PW3, extracted in paragraphs 13 and 14 hereinabove relate to the events of different dates. Whereas the testimony extracted in paragraph 13 relates to the event of 31.05.2002, that recorded in paragraph 14 relates to the events of 03.06.2002.

88. Learned senior counsel for appellant no.1 placed reliance on **Rakesh Kapoor** (supra), wherein the Supreme Court while relying on **Banarasi Dass** (supra) held that in the absence of proof with respect to the demand, the accused cannot be convicted and is entitled to a benefit of doubt. In **Ashish Kumar Dubey** (supra), this Court held that there was insufficient evidence to establish demand and acceptance by the accused. The testimony of the complainant witness was held to be unreliable and in the absence of any other evidence, the testimony of the official witness did not inspire confidence in the version put up by the prosecution. Thus, the Court held that demand and acceptance were not proved. In the present case, the complainant (PW-3) had given a reliable testimony, supported by the complaint (Ex. PW-3/A). The complainant has not been shown to be an interested witness-such that he had any specific interest in falsely implicating the appellants. The appellants do not claim to have known, or had any past dealings with the appellant. The reason given by appellant No. 1 in his statement recorded under Section 313 Cr. P.C. is not convincing. If not the appellants, some other officer would have examined the complainant's case in audit. Thus, merely by getting the appellants entrapped, the complainant could not have avoided the consequences of his sales tax record not being complete. The acceptance of the bribe has been corroborated by the other prosecution witnesses, including the shadow witness (PW-4), recovery witness (PW-8) and the TLO (PW-14). Their testimonies have been extracted, insofar as they are relevant, in a later part of the judgment. Therefore, **Ashish Kumar Dubey** (supra) and the aforementioned cases are of no help to the appellants.

89. In ***B. Jayaraj*** (supra), the complainant did not support the case of the prosecution and there was no other witness to prove the demand of the bribe. The Supreme Court held that in the absence of evidence to establish demand, a mere recovery cannot form the basis of conviction under Sections 7 and 13(1)(d)(i) and (ii) of the Act. The facts in ***B. Jayaraj*** (supra) are different to the present case, since the complainant (PW-3) has supported the case of the prosecution. ***B. Jayaraj*** (supra) has no application to the present case.

90. Reliance placed on ***Madan Mohan Lal Verma*** (supra) by the appellants also does not advance their case. In the present case, the prosecution had not sought to rely only on the testimony of the complainant (PW-3). Sachin Arora (PW-5) deposed that he had met the appellants before the trap was laid. The shadow witness (PW-4) has also supported the version of the complainant with respect to the acceptance of the bribe. Moreover, in ***State of U.P. v. Zakaullah***, (1998) SCC (CrL.) 456, the Supreme Court has observed that the evidence of a complainant requires greater scrutiny, but it cannot be rejected as he is aggrieved by the accused.

91. ***Banarasi Dass*** (supra), relied on by the learned senior counsel for appellant no.1, was a case where the demand was made by a Patwari to the complainant and a driver accompanying the complainant. In the said case, during the trap, the GC notes were kept on the table when the recovery witnesses reached the spot. Both the complainant and the driver (shadow witness) were declared hostile. The police and administrative official (recovery witnesses) were not present when demand and acceptance took place and their evidence to that effect was hearsay. The Supreme Court held

that since the recovery witnesses were not eyewitnesses to the demand and acceptance, in absence of any evidence of demand and acceptance, the accused-appellant cannot be convicted. It was further held that demand and acceptance is a *sine qua non* for the conviction of offences under Section 5 of the old PC Act (Section 7 of the new Act). It is pertinent to note that in ***Banarasi Dass*** (supra), although the complainant did support the case of the prosecution to some extent, she was declared hostile because she virtually denied the essential ingredients to bring home the guilt of the accused.

92. The facts of the present case are different to the facts of ***Banarasi Dass*** (supra) and the same provides no help to the appellants. In the present case, the complainant (PW-3) supported the case of the prosecution with respect to the demand and acceptance of bribe, unlike the complainant in ***Banarasi Dass*** (supra). The shadow witness (PW-4) also supported the prosecution while stating that bribe of Rs.20,000/- was given to the appellant no.1. Their testimonies corroborate the facts mentioned in the recovery memo (Ex. PW-3/E).

93. Moreover, Sachin Arora (PW-5), in his cross examination stated that:

“It is correct that on 3.6.2002 I was directed by Mr. Katyal to reach at STO in room No.902. It is correct that when I reached the STO, I found Mr. Katyal alongwith one person and the officers of audit team whom I used to meet earlier.”

(Emphasis supplied)

94. In ***M.O. Shamsudhin v. State of Kerala***, (1995) 3 SCC 351, it has been observed that there is no rule that evidence of every complainant in a bribery case should be corroborated in all material particulars, otherwise it

cannot be acted upon. In the present case, the complainant had evidently acted upon the information received from his accountant (PW-5) and visited the STO to meet the appellants. The same stands corroborated with the complainant's testimony and the complaint (Ex. PW-3/A). Sachin Arora (PW-5) had deposed that he had met the audit officers before 03.06.2002, i.e. when the trap was laid. Therefore, statements of the accountant (PW-5), the complainant (PW-3) and the complaint (Ex. PW-3/A) stand corroborated on all material particulars.

95. The prosecution/CBI relied on the sound recording of the trap proceedings to advance its case in establishing the acceptance of the bribe money. The learned Trial Court has also relied upon the same. Therefore, it becomes essential to discuss the admissibility of the evidence of sound recording made during the trap proceedings.

96. Section 3 of the Indian Evidence Act, 1872 makes every electronic record produced in evidence for the inspection to the court, a documentary evidence. When a document is an 'electronic record' within the definition of Section 2(1)(t) of the Information Technology Act, 2000 (hereinafter referred as 'IT Act'), it must be filed along with a certificate in compliance of the conditions mentioned in Section 65B of the Evidence Act. However, if the original electronic record is produced in the court, the compliance of Section 65B is not mandatory.

97. It is first to be ascertained, whether the transcription (Ex. PW-3/G) falls within the scope of Section 2(1)(t) of the IT Act. 'Electronic record' is defined as:

“(t) "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche”

(Emphasis supplied)

98. Section 2(1)(r) of the IT Act, defines ‘electronic form’ as:

“(r) "electronic form" with reference to information means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device ”

(Emphasis supplied)

99. Section 2(1)(i) of the IT Act, defines a ‘computer’ as:

“(i) "computer" means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network”

(Emphasis supplied)

100. The digital recorder records the sound in an ‘electronic form’. The transcription cum voice identification memo (Ex. PW-3/F) was made on a ‘computer’ by Insp. Amrik Raj (PW-13) by hearing the sound recording from the investigation copy of the cassette. He stated that *“I have prepared Ext. PW3/F on computer and not by my hand. I know how to operate the computer.”* Therefore, the ‘computer’ on which the transcription cum voice identification memo (Ex. PW-3/F), as well as the digital recorder on which

the sound was recorded, come under the definition of ‘computer’, and the transcription (Ex. PW-3/G) as well as the sound recording in the digital recorder is an ‘electronic record’ under the provisions of IT Act and the Evidence Act. Thus, unless the same digital recorder, on which the sound was recorded on 03.06.2002, is produced in the Court, the transcription (Ex. PW-3/G) would only be admissible with the certificate in compliance of Section 65B of the Evidence Act. In **Anvar P.V.** (supra), the Supreme Court has observed that 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.

101. It is settled law that secondary evidence is only admissible in Court when the person who prepared the copy of the original document, must have seen the original document himself. (See **Bank of Baroda, Bombay v. Shree Moti Industries, Bombay and others**, AIR 2008 Bom 201). A perusal of the record reveals that Insp. Amrik Raj (PW-13) had not heard the original recording from the digital recorder.

102. Relevant portion of the transcription cum voice identification memo (Ex. PW-3/F) reads as follows:

“The investigation copy of the cassette recorded on 3.6.2002 of the conversation between Sh. Rajpal Katyal above named and Sh. Girwar Singh, Sr. Audit Officer, O/o A.G. Audit Delhi the accused, has been inserted in the cassette recorder/player and played

Thereafter, on their confirmation that this cassette contains the same conversation which had taken place on 3.6.2002, the above said cassette was again played and transcription of the

conversation recorded in the cassette on 3.6.2002 has been prepared alongwith the name of the speakers as identified.”

(Emphasis supplied)

103. Insp. Amrik Raj (PW-13) in examination in chief stated:

“I also prepared the transcription of question conversation between the complainant Rajpal Katiyal and accused Girwar Singh by playing and hearing audio cassette recorded at the spot. Transcription was prepared in the presence of witnesses Sh. Mann Singh and Sh. SS Rana.”

104. In his cross-examination, he deposed:

“The cassette was already sealed from which we prepared the transcription after its opening. We did not inform the concerned court about the opening of the seal and we also did not take permission of the concerned court to open the seal of the cassette before preparing the transcription. I did not inform to the CFSL Authority regarding the breaking of the seal of the cassette from which I prepared the transcription.”

105. In his re-examination, he stated:

“I state that the transcription was prepared after listening the investigation copy of the cassette recorded on 3.6.2002 of the conversation between Sh. Rajpal Katiyal and Girwar Singh. This Memo was prepared and signed by me. The investigation copy of the cassette was not in sealed condition. I was a little bit confused as I had thought that the Ld. defence Counsel is asking about the cassette used for recording the specimen voice. I wanted to say that the question was about the seal on the cassette which is manufacturer seal on the cassette.”

(Emphasis supplied)

106. Therefore, it is clear that Insp. Amrik Raj (PW-13) made the transcription from the investigation cassette that was made on 03.06.2002.

Consequently, the transcription (Ex. PW-3/G) is inadmissible in evidence and the same cannot be looked into.

107. Insp. Amrik Raj (PW-13), Insp. Umesh Vashishth (PW-14) and Mann Singh (PW-4) deposed on the same lines with respect to the copying of the recording and sealing of the cassette. SI Prem Nath, who carried out the copying of the cassettes, was not made witness by the prosecution. Insp. Umesh Vashishth (PW-14), in his examination in chief stated that:

“The said recorded conversation was transferred into two audio cassettes with the help of an instrument. One cassette was sealed after wrapping it into a cloth wrapper, with CBI seal and the same was marked as “A”. Another copy of cassette was kept unsealed for the investigation purpose.”

108. In his cross-examination, he deposed that:

“The conversation which was recorded in the Samsung Digital Recorder was transferred into two separate audio cassettes, out of which one was sealed and the other audio cassette was not sealed. After transfer of the conversation from Digital Recorder into a cassette, the conversation in Digital Recorder was deleted. Prem Nath Sub Inspector was in the trap party. After taking the Digital Recorder from the complainant, it was heard and then Sub Inspector Prem Nath transferred the conversation into a cassette. Probably this was not written in the Recovery Memo that Sub Inspector Prem Nath transferred the conversation into a cassette. I did not record the statement of SI Prem Nath to the effect that he transferred the conversation into a cassette from Digital Recorder.”

(Emphasis supplied)

109. It appears that SI Prem Nath made two copies from the sound

recorded in the digital recorder on two blank cassettes. One of the cassettes was sealed and marked 'A' and the other was kept unsealed for investigation purposes. The original recording from the digital recording was deleted after copies were made on two separate blank cassettes. The sealed cassette marked 'A' was then sent to CFSL for voice analysis of the appellants and the complainant (PW-3).

110. Insp. Amrik Raj (PW-13) stated that:

“I do not remember at this stage if I compared investigation copy of the cassette with the original cassette. I also do not remember if I mentioned such comparison in any Memo or document. Now the witness is shown the file and after going through the same he states that he did not compare the original cassette with the investigation copy of the cassette. We did not file the investigation copy of the cassette on the record along with the charge-sheet”.

(Emphasis supplied)

Therefore, neither the CFSL report on sound analysis nor the transcription (Ex.PW-3/G) is based on the original recording made on 03.06.2002. The testimony of the expert witness to this effect is also unreliable. It is irrelevant that the parcels received by Rajinder Singh (PW-1) had the seals intact. In the present circumstances, merely finding the seals in proper condition does not make any difference, since it is an admitted position that the copy of the sound recording was sent and not the original. Thus, it would need examination whether the prosecution has been able to establish the guilt of the appellants *dehors* the voice recordings.

111. With regard to acceptance of the bribe amount, the complainant (PW-3) in his examination in chief, *inter alia*, stated that:

*“After brief introduction, I told the accused persons that I could arrange only Rs. 20,000/- and the balance amount would be paid by Sachin Arora later on to them. Mr. Mann Singh accompanied me as it was decided in CBI office that he will remain with me. **We gave the amount to Girwar Singh. ‘We’ means ‘I’ handed over the tainted amount of Rs. 20,000/- to Girwar Singh.**”*

(Emphasis supplied)

112. The recovery memo (Ex.PW-3/E) reads as follows:

*“After sometime **the complainant extended the bribe amount towards Shri Girwar Singh and told him that this time he could arrange only Rs. 20,000/- and the remaining bribe amount as demanded will be delivered later through the persons accompanying. At this the accused accepted the bribe amount** from his right hand and after counting with both the hands kept the same in his left hand and after that he went out to give the signal. The complainant also confirmed the same version of shadow witness.....”*

(Emphasis supplied)

113. The complainant (PW-3) as well as the shadow witness (PW-4) correctly identified appellant no. 1 in court. Shadow witness (PW-4) stated that:

*“... .. Thereafter I came out and gave the pre-appointed signal. On receiving the signal CBI team entered the room and I also followed them. Enquiries were made by the CBI officials from me as to who had accepted the money and **I told that Girwar Singh had accepted the bribe amount from Mr. Katyal.**”*

(Emphasis supplied)

114. In his cross examination, he stated that:

“It is correct that while extending the bribe amount towards Girwar Singh, the complainant told Girwar Singh that he could arrange only Rs.20,000/- and remaining amount will be delivered soon through the person accompanying him. It is incorrect to suggest that after accepting the (sic.) bribe amount, accused Girwar Singh counted the same with his both hands and after that kept the same in his left hand. It is incorrect to suggest that complainant Mr. Katyal did not offer any money to accused No.1. It is also incorrect to suggest that accused No.1 did not accept any amount or money from the complainant.”

(Emphasis supplied)

115. It is pertinent to note that although shadow witness (PW-4) resiled from his earlier stand with respect to the counting of the bribe (this apparent contradiction in the statement of PW4 is dealt with a little later), he maintained that bribe of Rs.20,000/- was accepted by the appellant no.1. The shadow witness (PW-4) corroborated the recovery memo (Ex. PW-3/E) on all material aspects and deposed that the complainant (PW-3) and the appellant no. 1 started talking about some case. Thereafter, the complainant (PW-3) gave the tainted GC notes to the appellant no. 1. This establishes that the appellant no. 1 accepted the bribe amount.

116. S.S. Rana (PW-8) narrated the entire trap proceedings. Although, he did not see the acceptance of bribe amount himself but he accompanied the CBI officers when the shadow witness (PW-4) gave the pre-determined signal of acceptance. S.S. Rana (PW-8) in his examination in chief stated that:

“Inspector Vashishth inquired from Sh. Raj Pal Katyal and Sh. Mann Singh about the transaction of bribe money and the conversation which took place between Sh. Raj Pal Katyal and the accused. Sh. Raj Pal Katyal and Sh. Mann Singh both disclosed to Inspector Vashishth that accused Girwar Singh had accepted the bribe money in his right hand and thereafter he counted the same with both hands. Sh. Raj Pal also disclosed that after accepting the bribe money, accused Girwar Singh had bent towards one side while remained sitting on his chair.”

117. Therefore, it is safe to conclude that the statement of S.S. Rana (PW-8) also corroborate to the chain of events that took place in room no.902 on 03.06.2002. The chain of events with respect to the raiding team entering room no. 902 was also corroborated by the testimony of Umesh Vashishth, TLO (PW-14). He stated that:

“... ..Immediately on receiving the signal, I along with other trap team members including other witness Sh. Rana rushed inside the room No.902 and found that complainant along with his Accountant Sachin Arora and the shadow witness Sh. Man were sitting and in front of them accused Girwar Singh and Lala Ram were sitting.”

118. The acceptance of bribe is further established through the hand wash of both hands of appellant no.1. The hand wash of both the hands of the appellant no. 1 was taken in sodium carbonate solution which turned pink. Thereafter, the portion of carpet from where the tainted amount was recovered was also washed in the solution of sodium carbonate which turned pink. The bottles with the solution of sodium carbonate were sealed at the spot and sent to CFSL for analysis.

119. The recovery of the bribe is also established in the present case. During the pre-raid proceedings, GC notes to the sum of Rs.20,000/- were

produced by the complainant (PW-3) and using the same GC notes a demonstration was given to the complainant, shadow witness (PW-4) and recovery witness (PW-8). The serial numbers of the GC notes (Ex. P1/1 to 40), which were to be used in the trap proceedings were noted in Annexure A of the handing over memo (Ex. PW-3/C). TLO (PW-14), after entering the room with the rest of the raiding team upon receiving a signal from PW-4, inquired the shadow witness (PW-4) about the transaction of bribe. Shadow witness (PW-4), in his examination in chief stated that the complainant and appellant no.1 discussed the matter and thereafter, the complainant handed over the bribe amount to the appellant no.1. The TLO (PW-14) deposed that he challenged appellant no.1 of demanding and accepting the bribe of Rs.20,000/- from the complainant, but he remained silent. The complainant disclosed that after taking the bribe amount, while he was giving a missed call to the pre-fed number, appellant no.1 leaned towards his left and sat back straight again. TLO (PW-14) inquired from appellant no.1 with regard to the concealment of the bribe but he again remained silent.

120. Thereafter, search of his table drawer and of other places was conducted. During the search, Mann Singh (PW-4) informed that the bribe money was kept under the carpet on the floor of the office room, towards left side of the accused. S.S. Rana (PW-8) was then asked to recover the GC notes. They were then directed to tally the numbers on GC notes with the ones noted in Annexure A of handing over memo (Ex. PW-3/C).

121. Shadow witness (PW-4), in his cross examination stated that:

“I have seen the GC Notes Ex.P1/1 to 40 and after tallying their numbers I can say that these are the same GC notes which were used as (sic.) trap money and recovered from under the carpet.”

122. The recovery witness (PW-8), in his examination in chief stated that:

“I picked up the bundle of Rs.20,000/- and compared its numbers with the numbers written in the paper prepared in CBI office earlier. The numbers of GC Notes were tallied with the numbers written in the paper Ex, PW-3/C. I have seen GC Notes Ex.P1/1 to Ex.P1/40 and after tallied their numbers, I can say that these are the same GC notes which I recovered.”

123. TLO (PW-14) deposed that hand washes of hands of appellant no.1 and the carpet were taken, and the colourless solution turned pink. The same was transferred to glass bottles and sent to the CFSL for analysis. The CFSL report (Ex. PW-2/A) reads as follows:

“Results of Analysis:

The Exhibit RHW, LHW and CW gave positive tests for Phenolphthalein and Sodium carbonate.”

124. Therefore, I do not find merit in the submission of the learned senior counsel for appellant no.1 that since the bribe amount was not recovered from the person of appellant no.1, it cannot be construed that he was in possession of the same. The aforesaid facts complete the chain of events from trap proceedings to recovery proceedings. The said chain of events have been corroborated by the complainant (PW-3), shadow witness (PW-4), recovery witness (PW-8) as well as the TLO (PW-14). The recovery memo (Ex. PW-3/E) also stands corroborated by their testimony. I also do not find merit in the submission that there are contradictions in the

testimony of the complainant (PW-3). It is a settled position that minor discrepancies in the testimony of the witnesses are bound to occur and are natural, when the statements are recorded after a significant period of time. Minor discrepancies that do not strike to the root of the case, can be ignored.

125. As far as the submission that there is contradiction in the recovery memo (Ex. PW-3/E) and the statements of the complainant (PW-3) as well as the shadow witness (PW-4) is concerned, once again I do not find any substance in the same. The complainant (PW-3), although in the recovery memo (Ex. PW-3/E) has stated that when he was giving the signal on the cell phone, he saw the appellant no. 1 lean towards his left side to conceal the bribe money, he has nowhere stated in his examination before the court that he saw the concealment taking place. There is a possibility of witnesses' memory failing owing to such a long lapse of time in conducting the examination of the complainant (PW-3). The recovery memo (PW-3/E) was recorded on 03.06.2002, whereas his examination before the Court took place on 01.08.2005, i.e. more than three years later.

126. Similarly, the shadow witness (PW-4), in his cross examination, stated that there is a possibility that on asking the complainant (PW-3), he informed the CBI officials that while he was busy giving the signal to CBI through his cell phone (pre-determined signal), he saw the appellant no.1 lean towards his left side and conceal the bribe amount. The shadow witness was cross examined on 18.10.2005 i.e. more than 3 years after the recording of the recovery memo. However, when it was put to the shadow witness (PW-4) in the cross examination, being a natural witness, he stated that it

was indeed possible that the complainant saw appellant no. 1 lean for concealing the bribe money and informed the same to the CBI officials.

127. Mr. Mittal has relied on the statement of recovery witness (PW-8) to submit that there exists a doubt with respect to the presence of phenolphthalein powder, since the said witness stated to have seen 'lightest pink colour solution'. I find no merit in this submission since the perception of colour is subjective in nature. It would be farfetched to rely on such a statement to hold that phenolphthalein powder may not have been present. The recovery witness (PW-8) is not a technical person to depose on the same. Moreover, the CFSL report (Ex. PW-2/A) clearly indicates the presence of phenolphthalein powder and the said report has not been challenged by producing any cogent contradictory evidence.

128. Learned senior counsel had placed reliance on *G.V. Nanjundiah* (supra) and *Pyare Lal* (supra) to submit that the evidence of a stock witness cannot be relied upon. However, the same is of no help to the appellants. In the present case, the appellants have failed to point out as to how the independent witnesses (i.e. PW-4 and PW-8), have any vested interest in the outcome of the case or any reason for which they would implicate the appellants. Merely, because Mann Singh (PW-4) was witness to other CBI cases does not make him a stock witness. In fact, perusal of the statement of Mann Singh (PW-4) reveals that he had resiled from his earlier statement at some occasions. Had he been a stock witness, he would have supported the case of prosecution in its entirety. In *Zakaullah* (supra), the Supreme Court has observed that:

“9. It is in evidence that PW6 was examined as a witness in a case at Moradabad in which he himself was the complainant against a doctor who demanded bribe from him. He also admitted that he was a witness in two other cases though he was not yet examined in those cases. Would such antecedents render him a non-independent witness? Similarly, the mere fact that PW7 was the driver of the vehicle in which the officials went to the place, resulted in his losing the status as “independent witness.”

*10. The necessity for “independent witness” in cases involving police raid or police search is incorporated in the statute not for the purpose of helping the indicted person to bypass the evidence of those panch witnesses who have had some acquaintance with the police or officers conducting the search at some time or the other. **Acquaintance with the police by itself would not destroy a man's independent outlook. In a society where police involvement is a regular phenomenon many people would get acquainted with the police. But as long as they are not dependent on the police for their living or liberty or for any other matter, it cannot be said that those are not independent persons. If the police in order to carry out official duties, have sought the help of any other person he would not forfeit his independent character by giving help to police action. The requirement to have independent witness to corroborate the evidence of the police is to be viewed from a realistic angle. Every citizen of India must be presumed to be an independent person until it is proved that he was a dependent of the police or other officials for any purpose whatsoever.** (Hazari Lal v. Delhi Administration, (1980) 2 SCC 390”*

(Emphasis supplied)

129. Therefore, merely because the witness was involved in other cases or had prior acquaintance with the police officers, would not result in the loss of his status as an independent witness. The appellants have also failed to show the dependability of PW-4 or PW-8 on the CBI officials, involved in

the present case. Both PW-4 and PW-8 were government employees. They enjoyed security of their status as government servants. There was no reason for them to implicate the appellants falsely. Moreover, the present case is not based solely upon only the testimony of PW-4 and PW8. The testimony of the complainant (PW-3) and TLO (PW-14) stand corroborated with that of PW-4 and PW8. From the aforesaid discussion, it is clear that the bribe amount of Rs.20,000/- was recovered from appellant no.1.

130. I do not find merit in the submission of the learned senior counsel that the presence of Sachin Arora (PW-5) at the time of trap proceedings can be doubted. Sachin Arora (PW-5) had himself admitted that when he reached STO, he saw the complainant with another person (shadow witness). He was also present in room no.902 at the relevant time and admitted to sign the recovery memo (Ex. PW-3/E).

131. Learned senior counsel for appellant no.1 placed reliance on *Suraj Mal* (supra), wherein the three witnesses who witnessed the taking of bribe were declared hostile. In this case, the trial court had held the evidence of the prosecution to be unreliable, and acquitted one of the accused, while convicting the appellant. It was in these circumstances that the appellant in the said case was acquitted. The facts of *M.K. Harshan* (supra) are different from the facts of the present case. The testimony of the witnesses in the said case was highly doubtful, and could not be said to have established the demand and acceptance. Therefore, both the cases are of no help to the appellants, as they turn on their own facts.

132. Section 20 reads as follows:

“20. Presumption where public servant accepts gratification other than legal remuneration.

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

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

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

133. In ***Madhukar Bhaskarrao Joshi v. State of Maharashtra***, (2000) 8 SCC 571, it was observed that:

“12. The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference

to be drawn is that the said gratification was accepted “as motive or reward” for doing or forbearing to do any official act. So the word “gratification” need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification. This will again be fortified by looking at the collocation of two expressions adjacent to each other like “gratification or any valuable thing”. If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word “gratification” must be treated in the context to mean any payment for giving satisfaction to the public servant who received it.”

134. Therefore, once it is established by the prosecution that the acceptance was “gratification”, Section 20 raises a rebuttable presumption that the public servant accepted such gratification for a ‘motive or reward’. The onus to prove shifts on the accused to prove that he did not accept the illegal gratification. However, if the accused fails to disprove the said presumption, then the Court may find him guilty of the offence under the Act. In the present case, the prosecution clearly established the demand as well as the acceptance of money by the appellants. It was then for the appellants to discharge the onus cast upon them by Section 20. However, they have failed to discharge the same by leading cogent evidence. In ***Girish Babu*** (supra), there was no reliable evidence of demand or acceptance made by the appellant, and the Court while relying on ***Suraj Mal*** (supra) held that mere recovery of the bribe would not entail a conviction under Section 7 of the Act. ***Suraj Mal*** (supra), ***M.K. Harshan*** (supra) and ***Girish Babu*** (supra) thus, have no application in the facts of this case.

135. Mr. Mittal submits that the file pertaining to the firm of the complainant (PW-3) was not found in the possession of the appellants. Further, he submits that in view of the contradiction in the statements of the complainant (PW-3), first that the ST-I form was deficient in the file and later, that the ST-I form was not issued at all, there was no motive for demanding illegal gratification by the appellants. He relied on the testimony of DW-1 to submit that there existed no reason for the appellant no.1 to demand illegal gratification since the file of complainant's firm was not in the possession of appellant no.1.

136. The production cum seizure memo (Ex. PW-4/H) clearly indicates that the file of the complainant's firm was seized on 03.06.2002 by TLO (PW-14) from Amar Singh Rawat through Gurubachan Lal, Senior Audit Officer (PW-11). The same is mentioned in the recovery memo (Ex. PW-3/E). Gurubachan Lal (PW-11) in examination in chief stated that:

“Record which was seized by CBI team, was pertaining to Audit Party No.10. Audit No.10 was consisting of Girwar Singh, Senior Audit Officer, Lala Ram, Assistant Audit Officer and A.S. Rawat, Senior Auditor. Girwar Singh and Lala Ram both accused are present in the Court (correctly identified).”

137. Therefore, I find no merit in the submission of the learned senior counsel that the file was not in possession of the appellants. PW-11 clearly deposed that the file pertained to Audit No.10 and that Audit no.10 comprised of the appellants in the present case. Even if the appellants were not in a position to help the complainant, it is meaningless since explanation (d) to Section 7 of the Act provides that: “(d) “A motive or reward for doing.” A person who receives a gratification as a motive or reward for

doing what he does not intend or is not in a position to do, or has not done, comes within this expression.”

138. In the present case, apart from the offence under Sections 13(1)(d) and 7, the appellants were charged and convicted under Section 120B of the IPC.

139. Section 120A, IPC defines criminal conspiracy to mean – when two or more persons agree to do, or cause to be done (a) an illegal act, or (b) an act, which not illegal by illegal means, such an agreement will be termed as a criminal conspiracy. In ***K.R. Purushothaman v. State of Kerala***, (2005) 12 SCC 631, the Supreme Court held as follows:

“11. In Major E.G. Barsay v. State of Bombay, 1961 CriLJ 828, Subba Rao J., speaking for the Court has said:

"The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts."

12. In State v. Nalini and Ors., 1999 CriLJ 3124 it was observed by S.S.M. Quadri J. at paragraph 677:

*"In reaching the stage of meeting of minds, two or more persons share information about doing an illegal act or a legal act by illegal means. **This is the first stage where each is said to have knowledge of a plan for committing an illegal act or a legal act by illegal means.** Among those sharing the information some or all may form an*

intention to do an illegal act or a legal act by illegal means. Those who do form the requisite intention would be parties to the agreement and would be conspirators but those who drop out cannot be roped in as collaborators on the basis of mere knowledge unless they commit acts or omissions from which a guilty common intention can be inferred. It is not necessary that all the conspirators should participate from the inception to the end of the conspiracy; some may join the conspiracy after the time when such intention was first entertained by any one of them and some others may quit from the conspiracy. All of them cannot but be treated as conspirators. Where in pursuance of the agreement the conspirators commit offences individually or adopt illegal means to do a legal act which has a nexus to the object of conspiracy, all of them will be liable for such offences even if some of them have not actively participated in the commission of those offences."

13. *To constitute a conspiracy, meeting of mind of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition and it is not necessary that all the conspirators must know each and every detail of conspiracy. Neither it is necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts. The agreement amongst the conspirators can be inferred by necessary implication. In most of the cases, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. The existence of conspiracy and its objects are usually deducted from the circumstances of the case and the conduct of the accused involved in the conspiracy. While appreciating the evidence of the conspiracy, it is incumbent on the Court to keep in mind the well-known rule governing circumstantial evidence viz. each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a*

chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible. Criminal conspiracy is an independent offence in the Penal Code. The unlawful agreement is sine qua non for constituting offence under the Penal Code and not an accomplishment. Conspiracy consists of the scheme or adjustment between two or more persons which may be express or implied or partly express and partly implied. Mere knowledge, even discussion, of the plan would not per se constitute conspiracy. The offence of conspiracy shall continue till the termination of agreement.”

(Emphasis supplied)

140. Thus, a criminal conspiracy comes into being when two or more persons come to an agreement to do an illegal act. It is not necessary that all the persons in the conspiracy should know everything, or that each conspirator should join the conspiracy at the same time. The conspiracy continues till the agreement is terminated either on its completion, or otherwise. The existence of a conspiracy and its objective are usually deducted from the circumstances of the case and the conduct of the accused involved in the conspiracy. The Supreme Court in ***Kehar Singh and Ors. v. State (Delhi Administration)***, (1988) 3 SCC 609, observed that a conspiracy is may be hatched in secrecy, and it may be difficult to adduce direct evidence in such cases, and the prosecution will more often rely on circumstantial evidence. The Supreme Court in ***State v. Nalini***, (1999) 5 SCC 253, observed that all conspirators need not take active part in the conspiracy. The Supreme Court observed:

“583. Some of the broad principles governing the law of conspiracy may be summarized though, as the name implies, a summary cannot be exhaustive of the principles.

x x x x x x x x

10. A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.”

141. According to Section 10 of Evidence Act, once a conspiracy is established by the prosecution, then any act of a co-conspirator, which is in furtherance of the conspiracy, will become the act of the other co-conspirators. Section 10 reads as follows:

“10. Things said or done by conspirator in reference to common design.—Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. ”

142. The Supreme Court in ***Central Bureau of Investigation v. V.C. Shukla and Ors.***, (1998) 3 SCC 410, held:

“40.In dealing with this Section in Sardul Singh v. State of Bombay, 1957 CriLJ 1325, this court observed that it is recognised on well established authority that the principle underlining the reception of evidence of the statements, acts and

writings of one co-conspirator as against the other is on the theory of agency. Ordinarily, a person cannot be made responsible for the acts of others unless they have been instigated by him or done with his knowledge or consent. **This section provides an exception to that rule, by laying down that an overt act committed by any one of the conspirators is sufficient, (on the general principles of agency) to make it the act of all.** But then, the opening of words of the Section makes in abundantly clear that such concept of agency can be availed of, only, after the Court is satisfied that there is reasonable ground to believe that they have conspired to commit an offence or an actionable wrong. **In other words, only when such a reasonable ground exists, anything said, done or written by any one of them in reference to their common intention thereafter is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it.** In *Bhagwan Swarup v. State of Maharashtra* 1976 CriLJ 860, this court analysed the section as follows:-

“(1) There shall be a prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy; (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other; (3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it; and (5) it can only be used against a co-conspirator and not in his favour.””

(Emphasis Supplied)

143. Accordingly, the words spoken and act performed by any one of the conspirator will be relevant to prove the involvement of the other accused persons or co-conspirators in the conspiracy, provided the Court has reasonable ground to believe that a conspiracy exists. As far as conspiracy is concerned, although prosecution is liable to produce independent evidence as to existence of the conspiracy for Section 10 to operate, it need not prove the same beyond reasonable doubt (See *Nalini* (supra)). The provision itself states “... *where there is reasonable ground to believe that two or more persons have conspired together to commit a crime....*”.

144. Reference may also be placed on *Ram Narayan Popli v. Central Bureau of Investigation*, (2003) 3 SCC 641, where the Supreme Court held as under:

“342. It would be appropriate to deal with the question of conspiracy. Section 120-B IPC is the provision which provides for punishment for criminal conspiracy. Definition of “criminal conspiracy” given in Section 120-A reads as follows:

“120-A. When two or more persons agree to do, or cause to be done,—

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.”

The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. (See: American Jurisprudence, Vol. II, Sec. 23, p. 559.) For an offence punishable under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.

343. No doubt, in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing by illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.”

(Emphasis supplied)

145. As discussed above, the fact that the initial demand was made by appellant no.2 on PW-5 and later by both the appellants, on the complainant (PW-3) was a part of the ‘same transaction’. On a perusal of the evidence, it is clear that the complainant (PW-3) had acted on the information received by his accountant (PW-5) to himself visit the S.T.O. Thus, on 31.05.2002, he was himself a witness to the demand by the appellants, as they raised the demand on him. The accountant (PW-5) admittedly met with the appellants before the trap proceedings. Apart from the complainant (PW-3), the shadow witness (PW-4), recovery witness (PW-8) as well as the TLO (PW-14) disclosed that appellant no.2 was present in room no.902 at the time of acceptance of the bribe. It is evident that both the appellants, under an agreement and understanding hatched a conspiracy to receive illegal gratification under a threat to raise tax demand against the firm of the complainant. Thus, the submission of learned counsel for appellant no.2 that no demand, acceptance and recovery qua appellant no.2 are established, is

rejected. It has been held in ***K.R. Purushothaman*** (supra) that in most cases, conspiracy is seldom an open affair and same needs to be proved by the circumstantial evidence. In the present case, the conspiracy is clearly established by the chain of events taken note of hereinabove.

146. Learned counsel for CBI placed reliance on ***D. Velayutham*** (supra) to submit that if the receipt and handing of the bribe amount by one accused convincingly and inexorably points towards his custodianship of part of the same bribe amount on behalf of the co-accused, then the co-accused cannot take a defence of non-handing of the bribe money. In such cases, the co-accused would be fastened with criminal culpability since the senior officer is in constructive receipt of the bribe. I find merit in this submission and the appellant no.2 cannot take the defence of non-receipt of the bribe amount. Appellant no.2's involvement in the conspiracy to demand the bribe amount has been established beyond all reasonable doubt. The acceptance of the bribe amount by appellant No. 1 is a part of the criminal conspiracy of both the appellants to demand and accept bribe from the complainant.

147. Thus, the demand of the bribe stands established by the testimonies of the complainant (PW-3), Sachin Arora (PW-5) and the complaint (PW-3/A). The acceptance and recovery of the bribe amount also stands established beyond any reasonable doubt by the testimonies of the complainant (PW-3), Mann Singh-shadow witness (PW-4), S.S. Rana-recovery witness (PW-8), Umesh Vashishth-TLO (PW-14), recovery memo (Ex. PW-3/E) and the report of CFSL (Ex. PW-2/A). Although, the accountant Sachin Arora (PW-5) did not fully support the case of the prosecution and was declared hostile, he did disclose his acquaintance with the appellants prior to the trap.

Assessing the entire evidence on record, the only irresistible conclusion reached is that the appellants raised a demand for illegal gratification, and accepted the bribe amount of Rs. 20,000/-, which was recovered on 03.06.2002. Accordingly, the conviction of the accused is upheld. The order of sentence is also upheld.

148. For all the aforesaid reasons, I find no merit in these appeals and the same are, accordingly, dismissed.

VIPIN SANGHI, J

APRIL 19, 2016