

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.181 of 2015

Arising Out of PS.Case No. -1 Year- 2008 Thana -C.B.I CASE District- PATNA

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1. Prabeen Kumar son of Krishna Nand Sharma, resident of 63E, Road No. 12,
Rajendra Nagar, P.S. Kadam Kuan, District Patna Appellant/s

Versus

1. The State of Bihar through Central Bureau of Investigation
.... Respondent/s

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Appearance :

For the Appellant/s : Mr. B.P. Pandey, Sr. Advocate
Mr. Ravi Bhardwaj, Advocate

For the Respondent/s : Mr. Bipin Kumar Sinha, Standing Counsel, CBI

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 18-07-2017

The sole appellant, Prabeen Kumar who has been found guilty for an offence under Section 13(1)(d) of the P.C. Act punishable under Sections 13(2) of the Prevention of Corruption Act whereunder sentenced to undergo RI for 5 years as well as fined of Rs. 20,000/- in default thereof, to undergo SI for 4 months additionally under Section 7 of the P.C. Act directing to undergo RI for 3 years as well as to pay fine of Rs. 10,000/- and in default thereof, to undergo SI for 2 months, additionally with a further direction to run the sentences concurrently by the Special Judge, CBI-3rd, Patna, vide judgment of conviction and order of sentence dated 31.03.2015 passed in connection with Special Case No. 03/2008 arising out of RC No. 01(A)/2008/CBI/ACB-VIII/New Delhi.

2. It is the case of the prosecution, that the appellant Prabeen Kumar being an Inspector of CBI posted at CBI Office, Patna



was entrusted to enquire into the allegation having been attributed to H.N. Singh, a Branch Manager of UCO Bank, Gidhaur Branch, Bihar by S.P. CBI, Patna Branch. After receipt of the complaint, Prabeen Kumar instead of inquiring into the matter, contacted H.N. Singh over phone in December 2007 and introduced himself with a further discloser that he has been entrusted with an enquiry against him which relates with advancing loan in illegal manner and so, directed him to meet for proper settlement. Aforesaid H.N. Singh shown his inability in getting his personal appearance on account of heavy work load for the present, but assured that anyhow he will be available on 09.01.2008. There happens to be further discloser that on 07.01.2008, Prabeen Kumar reminded him. After being apprehensive with regard to abnormal conduct of a CBI official, he became suspicious as might be impersonated by somebody else and so, he took cassette recorder, audio cassette to record voice of perpetrator and with all those equipments, he visited on 09.01.2008 and stayed at Marwari Awas located at Frazer Road, Patna and informed Prabeen Kumar regarding his stay. At about 4:00 P.M. Prabeen Kumar came at Marwari Awas, met with H.N. Singh at his room, had indulged in conversation which H. N. Singh got recorded through audio cassette record. It has also been divulged that during course of conversation, Prabeen Kumar demanded Rs. 3 Lacs to have report in his favour which was



ultimately settled at Rs. 2 Lacs which was to be paid by 28.01.2008. However, on account of showing inability at the end of H.N. Singh, one day was given by way of extension with an explicit direction to pay the same by 29.01.2008, positively. Because of the fact that H.N. Singh was not at all inclined to pay Rs. 2 Lacs as bribe and further, conceiving that Prabeen Kumar happens to be deployed at Patna Branch of CBI, on account thereof, instead of approaching the officials of Patna Branch, he directly approached main branch of CBI office, (S.P./ACU-VIII), New Delhi on 25.01.2008 on telephone and disclosed the whole event as well as demand of bribe at the end of Prabeen Kumar, Inspector, CBI., Patna Branch. S.P./ACU-VIII, New Delhi had instructed him to approach after their arrival at Patna. During midst thereof, as has been disclosed, the Superintendent of Police, CBI, New Delhi constituted a team which reached at Patna and stayed at different locations. On 29.01.2008, as per scheduled, H.N. Singh came at Patna, stayed at Marwari Awas (Room No. 75) and contacted Prabeen Kumar over phone divulging the fact that anyhow, he succeeded in arranging Rs. 50,000/- only and further assured that the remaining amount will be arranged and paid within 15 days. Then thereafter, he informed the Superintendent of Police, CBI and as per instruction, he reached at Hotel Mayur, Frazer Road, Patna in Room No. 251 where they were staying and as per instruction, furnished



written complaint against Prabeen Kumar to that effect which was entertained by the Superintendent of Police, CBI and further marked to VPS Mann, an Inspector for verification who verified the allegation in presence of two independent witnesses, namely, Kalpesh Kumar Sinha, an Upper Division Clerk and Vishwajit Kumar, a Lower Division Clerk, employees of Central Ground Water Board, Patna, whose presence were procured through an official order of the said department. During course thereof, H.N. Singh interacted with the witnesses as well as also produced audio cassette which contained recorded conversations in between H.N. Singh and Prabeen Kumar dated 09.01.2008 which were heard by them. During midst of aforesaid exercise, H. N. Singh received call from Prabeen Kumar which was disconnected as per direction so that necessary arrangements be made to record the conversations having in between. Then thereafter, as per instruction, H.N. Singh dialed Prabeen and the conversation took place which was recorded by VPS Mann in presence of independent witnesses and for that verification memo was prepared. In light of aforesaid conversation, it was decided to make a trap on 29.01.2008 itself in order to apprehend Prabeen Kumar red handed while accepting bribe and to enabling the same, zero FIR was registered as CBI/SEU/VIII/New Delhi against Prabeen Kumar (under Section 7 of the P.C. Act) at Patna on the basis of complaint filed by



H.N. Singh followed with verification conducted by VPS Mann, Inspector. As per direction of the Superintendent of Police, CBI, a Trap Team comprising of Satyendra Gosain, Inspector, CBI/ACU-IX, New Delhi, Pawan Kumar, Inspector, CBI/ACU-IX, New Delhi, Jitendra Singh, Sub-Inspector, CBI/ACI-VII, New Delhi, Raj Kumar PC, CBI/ACU VIII, New Delhi and two independent witnesses, namely, Kalpesh Kumar Sinha and Vishwajit Kumar was constituted.

3. In order to facilitate the aforesaid eventuality, the Trap Team firstly, indulged in pre-trap exercise which was conducted in Room No. 251 of Hotel Mayur and during course thereof, the complaint having been made by H.N. Singh were duly read in presence of members of the Trap Team including independent witnesses, Kalpesh and Vishwajit Kumar. The cassette produced by H.N. Singh was also heard by them which has been marked as 'A' and the subsequent cassette relating to recording of conversation in between H.N. Singh and Prabeen Kumar on the same day (29.01.2008) marked as 'B' were sealed. Then thereafter, H.N. Singh was directed to produce Rs. 50,000/- which he produced 100 in number each containing denomination of Rs. 500/-. The numbers of aforesaid currencies were noted down. Furthermore, demonstration relating to Sodium Carbonate Phenolphthalein test was done before the witnesses whereunder the currency notes were treated with



Phenolphthalein powder. The solution of Sodium Carbonate was prepared. One of the witnesses was asked to touch different currency note with his right finger and wash the finger in the said solution whereupon it changed its colour as pink. Remaining Phenolphthalein powder was destroyed in presence of independent witnesses. H. N. Singh was personally searched and was allowed to keep only mobile set. Personal search of Trap Team as well as independent witnesses were also conducted. The members of the Trap Team were allowed only to keep their I-Card. The treated 100 currencies of Rs. 500/- denomination were handed over to H.N. Singh with a direction to hand over the same to Prabeen Kumar as and when demanded. Kalpesh Kumar Sinha was requested to act as shadow witness by remaining close to H.N. Singh, so that he be able to hear conversation as well as to watch transaction. H.N. Singh was directed to give signal by stretching his muffler by his right hand or to give a call to VPS Mann by his mobile in case, finds adequate time. Another independent witness, Vishwajit was requested to remain with the remaining members of the Trap Team. Digital voice recorder was played to satisfy that there was no pre recorded voice. Introductory voice of both the independent witnesses was recorded. The aforesaid digital recorder was given to H.N. Singh to keep it in his shirt pocket in order to enable recording of the conversation having in between



him as well as Prabeen Kumar. Then thereafter, all the members of the trap team washed their hands with soap and water. A handling over memo was prepared with regard to aforesaid exercise.

4. On the same day i.e., on 29.01.2008 at about 2.15 PM, H.N. Singh proceeded towards Marwari Awas where he was staying followed by Kalpesh, a shadow witness. Members of the Trap Team also followed them. While H.N. Singh was inside his room No.75, presence of shadow witness around him along with members of the Trap Team nearby, Prabeen Kumar came at 4:55 PM over scooter which he parked near entrance of Marwari Awas. Then had proceeded towards room no. 75, however, seeing the waiter, he came out therefrom and stayed near his scooter. There was conversation in between H.N. Singh and Prabeen Kumar over mobile during course thereof, Prabeen Kumar directed H.N. Singh to come near Bank of India where he was standing. As per instruction, H.N. Singh came, met with Prabeen Kumar, indulged in conversation and during course of which H.N. Singh shown his inability to arrange Rs. 2 lacs in one stroke. Then Prabeen Kumar directed him to bring the amount whatever he has. H.N. Singh returned back to his room and came out with a hand bag containing the amount. Prabeen Kumar did not accept the hand-bag. On the other hand, handed over a plastic bag with a direction to keep the amounts in the same. H.N. Singh took the plastic



bag, went back to his room and firstly, contacted to VPS Mann to get proper instruction whether cash should be kept in plastic bag or not. As VPS Mann directed to keep the same, on account thereof, he kept the amount (treated Rs. 50,000/-) in the plastic bag and returned back to Prabeen Kumar. Seeing H.N. Singh, Prabeen started his scooter, talked with him. At the end of the conversation, Prabeen Kumar directed H.N. Singh to keep the plastic bag in his scooter's basket which H.N. Singh obeyed. All the conversation was heard by Kalpesh, shadow witness. At that very moment, Prabeen Kumar also said that if the remaining amount is not paid by Monday, then in that event, the case will be in same position.

5. Then it has been divulged that Prabeen Kumar proceeded ahead on scooter, however, was encircled by the member of the Trap Team along with witnesses and out of them, VPS Mann had challenged Prabeen Kumar after disclosing his identity. Furthermore, the whole event was disclosed by VPS Mann to Prabeen Kumar, his conduct whereunder he (Prabeen Kumar) has demanded bribe from H.N. Singh and in token thereof, accepted Rs. 50,000/- as part of the bribe money over which Prabeen became pale and perplexed. Out of nervousness as well as having presence of crowd on the road, Prabeen fell down along with the scooter. He was detained. Plastic bag having kept in the scooter's basket was taken out



by Vishwajit, as directed. All the members of the Trap Team along with independent witnesses took Prabeen to Room No.75 of Marwari Awas where post trap formalities were completed during course of which washed of both hand of Prabeen Kumar were taken in separate solution of sodium carbonate having no colour changed which were closed and sealed. All the members have put their signature over same. Then thereafter, the aforesaid exercise was done relating to inner portion of plastic bag whereunder the treated bribed amount was kept and during course thereof, the solution of sodium carbonate turned into pink which was also kept separately and sealed having signature of all the witnesses. Then thereafter, the number of currency notes were noted down by the independent witnesses which found tallied with the numbers recorded at an earlier occasion (handing memo) which were seized and for that seizure list was prepared, sealed, contained the signature of the witnesses. The plastic bag was also seized and sealed containing the signatures of the respective witnesses. VPS Mann also collected digital cassette recorder and cassettes from H.N. Singh which was played in presence of witnesses as well as trap team members including Prabeen Kumar which revealed taking of bribe by Prabeen Kumar. Then thereafter, recorded conversation was transferred into a blank audio cassette with the help of compact cassette recorder. The copy of cassette was prepared in



presence of witnesses which was sealed and signed by the respective witnesses and marked as 'C'. A rough site plan of P.O. was prepared by VPS Mann. Specimen impression of brass seal used during the aforesaid eventuality was also prepared in presence of witnesses, signed by the witnesses and then it was kept in custody. Then thereafter, recovery memo was prepared in presence of witnesses which were explained. On the basis thereof, Prabeen Kumar was apprehended followed with his personal search and for that, arrest-cum-personal search memo was prepared in presence of witnesses by the aforesaid VPS Mann during course of which mobile as well as one currency note was recovered and seized. Thereafter, trap team was devided in two groups. One had conducted search at the house of Prabeen Kumar while the other at the office wherefrom the copy of allegation petition against H.N. Singh was seized after preparation of seizure list. The scooter was taken to CBI, Patna Office premises where it was parked, however, no seizure list was prepared therefor.

6. After registration of the case, investigation followed and charge-sheet was submitted after concluding the same whereupon trial commenced and concluded in a manner as indicate above, subject matter of instant appeal.

7. The defence case as is evident from mode of cross-examination as well as statement under Section 313 CrPC is of



complete denial of occurrence.

8. Furthermore, it has specifically been pleaded that accused was never entrusted with an enquiry relating to an allegation against H.N. Singh and so, there was no occasion for him to raise demand. No part bribe amount was ever recovered from his possession. All the allegedly recorded conversations having been manufactured which even did not involve the appellant. He has been fallen victim at the high handedness of the CBI officials who hatched conspiracy along with persons, against whom he had investigated the case and recorded adverse to their interest while he was posted at New Delhi. However, No DW has been examined at his end. Document/material produced at the end of prosecution has been exhibited at the end of accused/appellant as A- Transcription of conversation of cassette (Marked 'A'), location of AIRTEL Tower as Ext-B, Transcription of conversation of cassette-B, Ext-C, Chapter-8 of CBI Manual as Ext-D, Letter issued by HOB/CBI, ACU-III, New Delhi regarding cases investigated by Prabeen Kumar regarding as Ext-E, Letter of V.K. Singh, Head of Branch CBI/ACB Patna as Ext-F, letter of SP, CBI/ACB, Letter of SP, CBI/ACB, Patna in reply under Right to Information Act.

9. In order to substantiate its case the prosecution had examined altogether 26 witnesses out of whom, PW-1, Amrendra



Kumar Singh, PW-2, Basant Kumar Singh, PW-3 Sanjay Kumar Sinha, PW-4 Sandeep Sahay, PW-5 Sanjay Kumar, PW-6 Om Prakash Sharma, PW-7 Arjun Prasad, PW-8 Surendra Rajak, PW-9 Shyam Nandan Singh, PW-10, Arun Kumar Srivastava, PW-11, Kalpesh Kumar Sinha, PW-12, Vishwajit Kumar, PW-13, Mahesh Chandra Joshi, PW-14, Deepak Kumar Tanwar, PW-15, R.K. Saldhi, PW-16, T.P. Venkatesh, PW-17, A. D. Tiwari, PW-18, Ravi Bhushan Sahay, PW-19, Pawan Kumar, PW-20, Onkar Nath Singh, PW-21, Devendra Kumar Rai, PW-22, Avdhesh Kumar, PW-23, V.B. Ramteke, PW-24, Saurabh Tripathi, PW-25, Dinendra Kashyap and PW-26 Virendra Pal Singh Mann.

10. Side by side had also exhibited Ext-1, sanction order, Ext-2, letter of DE (MS & TxR) PGM TD, Patna in respect of Mobile No. 9430888043 in the name of Prabeen Kumar along with copy of identity card of the applicant and copy of demand note of new land line connection. Ext-3, signature of Prabeen Kumar on original application form having allotted Mobile No. 9430888043, Ext-4 and 4/1, signature of N. Choubey DE (MS) Telecom on receipt memo, Ext-5, Call details of Mobile No. 9430888043, Ext-6, Call details of Mobile No.9931264869, Ext-7, Forwarding letter of Sandeep Sahay, Circle Nodal Officer Bharti Airtel Limited, Ext-8, Seizure memo of enrollment form and other documents of Mobile No. 9931264869,



Ext-8/1, Signature of Sandeep Sahay, Circle Nodal Officer Bharti Airtel Limited, Ext. 9, Entry dated 28.01.2008 of register of hotel Akash showing arrival and departure of Harish Nandan Singh, Ext-10, entry card of Marwari Awas Griha in handwriting of Harish Nandan Singh showing date of arrival dated 09.01.2008 at 2:00 PM. and date of departure at 18.42 PM. Ext-10/1, bill of Marwari Awas in the name of Harish Nandan Singh showing arrival dated 29.01.2008, Ext-11, entry card of Marwari Awas in handwriting of H.N.Singh showing date of arrival 29.01.2008, Ext-11/1, bill of Marwari Awas in the name of H.N. Singh showing arrival date 29.01.2008, Ext-12, entry on visitors register at serial no. 8392 dated 09.01.2008, Ext-12/1, entry on visitors register at serial no. 8948 dated 29.01.2008, Ext-13 and 13/1 signature and endorsement of Om Prakash Sharma, the then Manager, Marwari Awas on seizure memo, Ext-14, entry in the name of Darmendra Kumar Singh dated 11.12.2006 on temporary complaint register against H.N. Singh the then Branch Manager UCO Bank, Giddaur, Jamui, Bihar showing entry “shown to Sri Prabeen Kumar, Inspector, this branch as per order”, Ext-15, Signature of SP CBI, Patna on complaint petition. Ext-15/1 signature of DIG Praveen Sinha on complaint petition, Ext-16, Call letter dated 15.12.2006 sent by SP CBI to Dharmendra Kumar Singh regarding complaint against H.N. Singh, Branch Manager. Ext-17, note sheet by which directed to IO to



collect information on complaint, Ext-17/1 On note sheet SP CBI, Dinendra Kumar Kashyap directed to Prabeen Kumar for scrutiny and report, Ext-17/2, On note sheet signature of Prabeen Kumar, Ext-18 Signaure of Surendra Rajak on seizure memo and original compliant of Dharmendra Kumar, Ext-19, entry no. 406 on visitor's register of Hotel Mayur dated 29.01.08 showing Satyendra Gosain was stayed there on 29.01.08, Ext-20, endorsement on seizure memo, Ext-20/1, signature on seizure memo of visitors register of hotel Mayur, Ext-21, confidential letter of Anand Kumar Agrawal, Scientist D sent to Kalpesh Kumar Sinha with a request to carry out one day duty with CBI Officer on 29.01.2008, Ext-22, 22/1 Signatures of Kalpesh Kumar Sinha on verification report, Ext-22/2 to 22/5 signatures of Kalpesh Kumar Sinha on handing over memo, Ext-23, signature of Kalpesh Kumar Sinha on the bottle of RHW, Ext-23/1, signature of Kalpesh Kumar Sinha on LHW, Ext-23/2, signature of Kalpesh Kumar Sinha on notes bundle, Ext-23/3, signature of Kalpesh Kumar Sinha on the bottle of bag wash, Ext-23/4, signature of Kalpesh Kumar Sinha on envelope of bag, Ext-23/5, signature of Kalpesh Kumar Sinha on map, Ext-23/6 to 23/11, signature of Kalpesh Kumar Sinha on recovery memo, Ext-23/12, signature of Kalpesh Kumar Sinha on arrest-cum-personal search memo, Ext-23/13, signature of Kalpesh Kumar Sinha on arrest memo, Ext-23/14 to 23/15, signature



of Vishwajit Kumar on cassette, Ext-23/16 to 23/19, signature of Vishwajit Kumar on bottle of LHW and RHW, Ext-23/22 and 23/23, signature of Vishwajit Kumar on bag wash and plastic bag, Ext-23/24, signature of Vishwajit Kumar on sealed packet of tainted notes. Ext-23/25, signature of Vishwajit Kumar on cassette C, Ext-23/26, signature of Vishwajit Kumar on cassette packet, Ext-23/27, signature of Vishwajit Kumar on map, Ext-23/28 to 23/33, signature of Vishwajit Kumar on recovery memorandum, Ext-23/34, signature of Vishwajit Kumar on search-cum-seizure memo of document seized from table and almirah of Prabeen Kumar, Ext-23/35 signature of Vishwajit Kumar on arrest-cum-personal search, Ext- 23/36 and 23/37, signature and endorsement of Deepak Kumar Tanver on envelope of cassette A and original packing of cassette A, Ext-23/38, signature and writing of opinion no. of Deepak Kumar Tanver, Ext-23/39, signature and writing of opinion no. of Deepak Kumar Tanver on cassette B, Ext-23/40 and 23/41, signature of Deepak Kumar Tanver on packing of cassette C, Ext-23/42, signature of Deepak Kumar Tanver on envelope of sealed packing, Ext-23/44, signature of Deepak Kumar Tanver on sample cassette S-1, Ext-23/45, Signature of R.K. Saldi on cassette of voice reocord of Prabeen Kumar, Ext-23/46 to 23/47, Signature of R.K. Saldi on memorandum, Ext-23/48, signature of Prabeen Kumar on page no.2 of memorandum, Ext-



23/49, signature of T.P. Venkatesh on cassette of voice record of Prabeen Kumar, Ext-23/50 to 23/51 signature of T.P. Venkatesh on memorandum of voice recording, Ext-23/52, signature of T.P. Venkatesh on voice sample cassette of Prabeen Kumar, Ext-23/53, signature of T.P. Venkatesh on memorandum of voice recording, Ext-23/54, V.T. Abraham on memorandum, Ext-23/55 to 23/58 signature of Pawan Kumar on handing over memo, Ext-24 File D 9 pending complaint seized after arrest of Prabeen Kumar, Ext-24/1, complaint of Dharmendra Kumar Sinha against Branch Manager UCO Bank, Ext- 25 to 25/1 questioned handwriting of Prabeen Kumar and specimen handwriting of Prabeen Kumar, Ext-26, Opinion of GEQD, Ext-27, forwarding letter No. CX38/2008/737 dated 26.02.2008. Ext-28, Forensic Voice examination report, Ext-29, report of chief officer UCO Bank showing no departmental enquiry/complaint etc. pending against H.N. Singh till 24.05.2008, Ext-30, handing over memo, Ext-31, attendance register of CBI officers, Ext-32, Chemical Examination report of Central Forensic Science Laboratory, Ext-33, Complaint petition of H.N. Singh, Ext-33/1, endorsement of Superintendent of Police, Saurabh Tripathi on complaint(Ext-33), Ext-34, First Information Report, Ext-35, formal First Information Report, Ext-36, verification report, Ext-33/2, signature of P.G. Haridutta (IO) on cassette of voice sample of Prabeen Kumar, Ext-33/3 to 33/6,



signature of Virendra Pal Singh Mann on handing over memo, Ext-33/7, signature of VPS Mann on last page of recovery memo, Ext-33/8 to 33/9 signature of PG Haridutta, the then Dy. Superintendent of Police, (IO) on memorandum of voice sample of accused, Ext-38, recovery memo, Ext-38/1 receiving of copy of recovery memo of accused Prabeen Kumar, Ext-39, arrest-cum-seizure memo, Ext-39/1, signature of Prabeen Kumar, Ext-39, arrest-cum-seizure memo, Ext-40, search-cum-seizure memo dated 29.01.2008, Ext-40/1 and 40/2 two seizure memo dated 05.09.2008 and 11.06.2008, Ext-40/5 production-cum-seizure memo dated 30.01.2008, Ext-42, statement of account of H.N. Singh of UCO Bank showing withdrawal of Rs. 50,000/- cash on 28.01.2008, Material Ext-1, bottle of RHW, Material Ext-II, bottle of LHW, Material Ext-III, sealed packet of notes, Material Ext-IV, bottle of bag wash, Material Ext-V, packet of jhola(bag), Material Ext-VI, Seal stamp, Material Ext-VII, mobile, Material Ext-VIII, Cassette B, Material Ext-IX cassette C, Material Ext-X and XI packets of cassette, Material Ext-XII, cassette of voice sample of Prabeen Kumar.

As stated above, no DW has been examined on behalf of appellant though some of exhibits as narrated hereinabove have been made on his behalf.

11. Challenging the verdict of guilt recorded against the



appellant, it has been submitted by the learned counsel for the appellant that the prosecution utterly failed to substantiate its case and in likewise manner, there happens to be mechanical activity at the end of the learned lower court and the cumulative effect thereof nullify the finding. Furthermore, elaborating his submissions, the learned counsel for the appellant has first of all strikes upon the jurisdictional avenue and on this very score, it has been submitted that CBI, Delhi Wing was not at all competent enough to register a case at his own, as a result of which conduction of investigation, submission of charge-sheet with regard to the offence allegedly committed within the jurisdiction of Patna wing being in contravention of CBI Manual, forbids such kind of activity, and that being so, suffers from illegality since inception. It has also been submitted that from nature of offence it is found confined to local area of Patna Wing and in terms of Section 177 of the CrPC, it was/is to be cared by the local wing of the CBI and that happens to be the reason behind, proceeding of the trial which the CBI allowed at the present place, in order to patch up the wrong, illegality having committed at their end. It has also been submitted that the said point had earlier been raised before the learned lower court though blatantly turned down. Hence, in view of the learned counsel for the appellant, commencement of trial appears to be an outcome of illegal approach taken up by the CBI, Delhi



pervading jurisdiction of local CBI Wing in contravention of CBI Manual whereupon, judgment suffers from gross illegality.

12. It has also been submitted that the learned lower court should have considered that there happens to be complete absence of positive, concrete, conclusive evidence over demand. In order to shake the prosecution case on that very score, it has been submitted that so alleged complainant H.N. Singh died before his evidence. There is no an iota of evidence adduced on behalf of prosecution to substantiate the demand made by the appellant by bringing forward a person who could have testified on that score. So, the graveness of prosecution case is found completely extinguished. In likewise manner, it has also been submitted that though on account of death of I/O, he could not be examined but non examination has caused serious prejudice to the interest of appellant and on account thereof, judgment impugned would not survive.

13. It has also been submitted that electronic evidence so brought up at the end of the prosecution , on account of its inadmissibility as, not been made an exhibit in accordance with legal requirement prescribed under Section 65B of the Evidence Act, in no way going to support the case of the prosecution and so, there happens to be complete absence of legal, authentic, admissible piece of evidence, whereupon the finding so recorded by the learned lower



court relating to Section 7 of the P.C. Act, is found distorted one.

14. It has also been submitted that conviction recorded under Section 13(1)(d) of the PC Act is also not sustainable in the eye of law as well as on account of inconsistency amongst evidence of the PWs wherefrom improbabilities being exposed from their conduct coupled with the legal deficiency persisting on that very score. In order to buttress such plea, it has been submitted that prosecution had adduced evidence that appellant came at Marwari Awas on a scooter gone to the place of H.N. Singh, however, hurriedly backed seeing waiter and, he talked with H.N. Singh, instructed him, who came to him along with cash in a bag which he did not opt to accept and instead thereof, gave a plastic bag whereunder the amount was to be kept, obeyed by H.N. Singh as instructed by Mann and as per instruction, H.N. Singh kept the same in scooter basket which was later on, recovered after having been intercepted by the Trap Team, is found not at all convincible in the background of the fact that no search and seizure list happens to be prepared relating to scooter nor, during course of trial, the prosecution had led the evidence that appellant had any scooter, registration number of the scooter, ownership of the scooter, entrustment of the scooter. It is surprising feature that plastic bag allegedly containing tainted amount was seized from the basket of the scooter and for that search-cum-seizure list was



prepared but scooter was left out. Had there been search and seizure relating to the scooter showing its seizure near about or in surrounding of Marwari Awas where H.N. Singh was present since before would have suggested presence of appellant at that very place and further probability of keeping plastic bag containing tainted amount in its basket. It has further been asserted that when demand has not been proved, then in that circumstance, finding of the learned lower court relating to an offence punishable under Section 13(1)(d) of the P.C. Act, would not survive.

15. It has been submitted that appellant happens to be an honest officer of the CBI, having unblemish service carrier without any kind of blemish whereupon, it was not expected at his end to demand bribe by way of misusing his office. That being so, the matter needs close scrutiny, more particularly, when the prosecution agency happens to be CBI, a parent institution. The whole exercise was being governed under the surveillance of Superintendent of Police, CBI, New Delhi who was staying at Patna for that purpose alone leading the so alleged trap team. There happens to be an admitted fact that tainted amount was not at all touched by the appellant nor it was recovered from physical possession of appellant. Under such circumstances, was not it an obligation over the prosecuting agency to have finger print engrafted over the plastic bag duly scanned which, as



alleged, appellant had directed the aforesaid H.N. Singh for keeping money therein and had there been such exercise, would have a definite connectivity. Furthermore, a deliberate approach of the prosecution has also been exposed by asking the time schedule referring the search-cum-seizure list which was prepared at Marwari Awas inconsonance with arrest memo and the gap in between, as submitted by the learned counsel for the appellant, appears to be hazardous to the prosecution in the background of defence having been taken at the end of the appellant. It has also been submitted that the whole liaising was at the instance of Superintendent of Police, CBI, New Delhi on his own who was not at all competent on that very score due to leaving headquarter without having an administrative order from his superior officials. That has purposely been avoided by Superintendent of Police, who was going with the fragrance of vengeance as well as callousness with persons who were adversely affected with the activity of the appellant during course of performance of his official duty while being posted at Delhi. That happens to be reason behind rushing from Delhi with his henchmen without verifying authenticity of the allegation which at that very moment was not before him.

16. In its continuity, it has also been submitted that dubious character of the prosecution is apparent from the record itself



whereunder, though the call details allegedly with regard to conversations materialized in between appellant and H.N. Singh has been exhibited, no call details relating to conversation having in between Superintendent of Police, New Delhi as well as H.N. Singh has been furnished. So, really, H.N. Singh was a person or a fictitious person set up by the prosecution only to malign the appellant, the learned lower court should have considered, more particularly, in the background of the fact that there happens to be clear-cut evidence that just after trapping, H.N. Singh disappeared by way of leaving Marwari Awas and remained away till his death. In likewise manner, it has also been submitted that the prosecution, with ulterior motive, brought on record by way of examination of an expert that a voice having under tape recorder to be that of appellant, but withheld to place whether other voice happens to be that of H.N.Singh. That being so, the conversation was in between H.N. Singh as well as appellant has not been substantiated, conclusively which the prosecution would have cared as availability of H.N.Singh was there, during course of continuation of investigation. So, as urged by the learned counsel for the appellant, prosecution miserably failed to substantiate its case and in likewise manner, the learned lower court acted in a pre-occupied mind whereupon, the judgment of conviction and order of sentence would not survive and is fit to be set aside.



17. Apart from this, it has also been submitted that though Investigating Officer has been shown to be dead, but due to non-examination, vital clue remained unexplained, whereupon interest of appellant is found adversely affected upon, gives an additional ground in his favour.

18. Learned Standing Counsel representing the CBI vehemently refuted the submissions made on behalf of appellant and submitted that it happens to be unfortunate for the prosecution that his star witness H.N. Singh died before his examination. So far identification of H.N. Singh is concerned, that does not remain under mystery as the bank official had categorically deposed affixing identity of H.N. Singh being one of employees of UCO Bank being posted as Branch Manager, Gidhaur Branch. Prosecution had also established that there was a complaint against the aforesaid H.N. Singh at the end of local Secretary of a political party and as allegation so put therein needed some sort of preliminary enquiry as it relates to financial irregularity, on that very score, appellant, Prabeen Kumar was entrusted with an enquiry and for that, apart from examination of the witnesses, relevant registers have also been exhibited which show receipt of the complaint petition by the appellant himself and aforesaid copy was recovered from his drawer during course of search and seizure of his office on the same day after



apprehension of appellant by the Trap Team, in his presence. Therefore, cause for demand was very much exposed and is found substantially cadenced by way of exhibiting the call details relating to indulgence by the appellant with aforesaid H.N. Singh just after being entrusted with verifying the allegations and those details are in conformity with the requirement of law so envisaged under Section 65B of the Evidence Act whereupon, is admissible. From call details it is apparent that appellant indulged in calling H.N. Singh after having been entrusted to hold an enquiry with regard to allegations having been levelled against H.N. Singh and the reason thereof, was exclusively within the knowledge of the appellant which he would have explained on account of initial burden duly discharged at the end of the prosecution, in terms of Section 106 of the Evidence Act. Even during course of statement recorded under Section 313 CrPC, the appellant failed to substantiate the same or explained the same. Having failed on that very score, a presumption under guise of Section 114 of the Evidence Act will be attracted against the appellant.

19. It has also been submitted that death of H.N. Singh was not going to affect the prosecution case over demand as there happens to be another source of direct evidence i.e., taperecording of conversations having taken place in between H.N. Singh and the appellant at different occasions and those tapes have been marked as



‘A’ ‘B’ and ‘C’ for identification during investigation and are an exhibits which genuineness has been substantiated by an expert who, during course of trial, re-affirmed without having adduced at the end of appellant. Not only this, apart from members of team, independent witnesses also deposed with regard to presentation of tape (A) by H.N. Singh which was heard by them divulging conversation having taken place in between H.N. Singh and appellant even in their presence on 20.01.2008 (Marked B) which could not be demolished. On the basis thereof, the factum of demand having been advanced at the end of appellant is found conclusively proved. Furthermore, so far trapping exercise is concerned, that has to be considered in the background of status of the appellant, being a CBI sleuth, he was very much aware with its niceties and in likewise manner, was apprehensive, cautious, vigilant in order to ward off any kind of activity having at the end of H.N. Singh and so, instead of accepting the amount having been kept in a bag, since before, handed over plastic bag for keeping the amount and then insisted upon to be kept in scooter basket by the H.N. Singh, himself. Though, there happens to be consistent evidence of independent witnesses including that of members of trap, giving a minute to minute details, moreover, presence of appellant over search-cum-seizure list relating to recovery of Rs. 50,000/- (tainted amount), having been confirmed by the Trap



Team, not been denied, bifurcation of the team subsequently, in order to search out the residential house of the appellant as well as office of the appellant is also not denied, subsequently thereof, preparation of arrest memo also not been denied. Those events are indicative of the fact that a trap team led by Superintendent of Police, CBI, New Delhi at Patna to lay a trap against the appellant could not be doubted. As per CBI Manual, there happens to be no necessity to inform the local wing, more particularly, was not at all plausible as, the culprit happens to be one of its officials having been posted there. In like wise manner, it has also been submitted that CBI, New Delhi being the head office has got jurisdiction all over India irrespective of bifurcation of its activity under different wings and so, there happens to be no jurisdictional error so far registration and investigation is concerned. So far trial is concerned, that has taken place in accordance with law.

20. It has also been submitted that only for defence sake, it has been pleaded at the end of appellant that he has been victimized at the instance of those persons against whom appellant had reported adversely while was posted at Delhi because of the fact that from their end also, it has been adduced that he was transferred in the year 1998 from Delhi and during midst thereof, there is no clipping of facts that appellant was being kept under watch by those persons nor the



persons have been properly identified. Mere evasive suggestion on that very score for defence sake is not going to favour the appellant. So, the present episode which surfaced after a gap of 10 years, would not justify the submission made on behalf of appellant. Furthermore, it has been submitted that non-examination of the Investigating Officer happens to be on account of his death. Moreover, defence could not be able to place through reliable evidence that on account of death of Investigating Officer, his interests have been prejudiced.

21. Consequent thereupon, the finding having been recorded by the learned lower court based upon the factual as well as legal aspect did not attract interference.

22. Whenever there happens to be a prosecution under the P.C. Act, more particularly, relating to Section 7 as well as 13 thereof, the prosecution has to substantiate whether there happens to be evidence relating to demand, acceptance followed with recovery of tainted amount out of dominance of the accused/delinquent. Mere recovery of tainted amount without having evidence of demand, acceptance will luxate the prosecution case in its entirety. Presumption though rebuttable against an accused is to be taken only after success of prosecution in properly discharging the burden.

23. In *V. Sejappa v. State by Police Inspector Lokayukta, Chitradurga* as reported in (2016) 12 SCC 150, it has been held as



follows:-

10. In order to constitute an offence under Section 7 of the Prevention of Corruption Act, 'proof of demand' is a sine quo non. This has been affirmed in several judgments including a recent judgment of this Court in *B. Jayaraj v. State of Andhra Pradesh* (2014) 13 SCC 55, wherein this Court held as under:-

"7. Insofar as the offence under Section 7 is concerned, it is a settled position in law that demand of illegal gratification is sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down in several judgments of this Court. By way of illustration reference may be made to the decision in *C.M. Sharma v. State of A.P.*(2010) 15 SCC 1 and *C.M. Girish Babu v. CBI* (2009) 3 SCC 779."

The same view was reiterated in *P.Satyanarayana Murthy v. District Inspector of Police, State of Andhra Pradesh and Anr.* (2015) 10 SCC 152.

11. xxx xxx
12. xxx xxx
13. xxx xxx
14. xxx xxx
15. xxx xxx
16. xxx xxx
17. xxx xxx

18. It is well settled that the initial burden of proving that the accused accepted or obtained the amount other than legal remuneration is upon the prosecution. It is only when this initial burden regarding demand and acceptance of illegal gratification is successfully discharged by the prosecution, then the burden of proving the defence shifts upon the accused and a presumption would arise under Section 20 of the Prevention of Corruption Act. In the case at hand, all that is established by the prosecution was the recovery of money from the appellant and mere recovery of money was not enough to draw the presumption under Section 20 of the Act.



19. After referring to *Surajmal v. State (Delhi Administration)* (1979) 4 SCC 725, in *C.M. Girish Babu v. CBI, Cochin, High Court of Kerala* (2009) 3 SCC 779, it was held as under:-

"18. In *Suraj Mal v. State (Delhi Admn.)* (1979) 4 SCC 725, this Court took the view that (at SCC p. 727, para 2) mere recovery of tainted money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused, in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe."

20. In *State of Kerala and Anr. v. C.P. Rao* (2011) 6 SCC 450, it was held that mere recovery of tainted money is not sufficient to convict the accused and there has to be corroboration of the testimony of the complainant regarding the demand of bribe.

21. While dealing with the contention that it is not enough that some currency notes were handed over to the public servant to make it illegal gratification and that the prosecution has a further duty to prove that what was paid was an illegal gratification, reference can be made to following observation in *Mukut Bihari and Anr. v. State of Rajasthan* (2012) 11 SCC 642, wherein it was held as under:-

"11. The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused, when the substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as bribe. Mere receipt of amount by the accused is not sufficient to fasten the guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal



gratification, but the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness and in a proper case the court may look for independent corroboration before convicting the accused person."

24. In *Chittaranjan Shetty v. State by CBI Bangalore* as reported in (2015)15 SCC 569, the applicability of Section 13 (1) (D) has been explained in following manner:-

21. After carefully perusing the material on record, including the judgments and orders passed by the courts below, the appellant's case fails to convince us. This Court, in *M. Narayanan Nambiar v. State of Kerala* (AIR 1963 SC 1116) gave a broad interpretation to Section 5(1) (d) of the Prevention of Corruption Act, 1947, which is in pari materia with Section 13(1)(d) of the Act and held:

" 10. ... First taking the phraseology used in the clause, the case of a public servant causing wrongful loss to the Government by benefiting a third party squarely falls within it. Let us look at the clause "by otherwise abusing the position of a public servant," for the argument mainly turns upon the said clause. The phraseology is very comprehensive. It covers act done "otherwise" than by



corrupt or illegal means by an officer abusing his position. The gist of the offence under this clause is, that a public officer abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage. "Abuse" means mis-use i.e. using his position for something for which it is not intended. That abuse may be by corrupt or illegal means or otherwise than those means. The word 'otherwise' has wide connotation. ...The juxtaposition of the word 'otherwise' with the words 'corrupt or illegal means', and the dishonesty implicit in the word "abuse" indicate the necessity for a dishonest intention on his part to bring him within the meaning of the clause. Whether he abused his position or not depends upon the facts of each case; nor can the word 'obtains' be sought in aid to limit the express words of the Section. 'Obtain' means acquire or get. If a corrupt officer by the said means obtains a valuable thing or a pecuniary advantage, he can certainly be said to obtain the said thing or a pecuniary advantage; ... On a plain reading of the express words used in the clause, we have no doubt that every benefit obtained by a public servant for himself or for any other person by abusing his position as a public servant falls within the mischief of the said clause.

Following this decision, in *Major S.K. Kale v. State of Maharashtra* [(1977)2 SCC 394] this Court held that the abuse of position by a public servant must necessarily be dishonest and it must be proved that the accused caused deliberate loss to the department:-

“9. ... The abuse of position, as held by this Court, must necessarily be dishonest so that it may be proved that the appellant caused deliberately wrongful loss to the Army by obtaining pecuniary benefit for PW 1.”

The dictum in this judgment was followed in *S.P. Batnagar v. State of Maharashtra*[(1979)1 SCC 535] where the importance of the element of dishonest intention was again reiterated.

22. On a perusal of the abovementioned judgments, it can be concluded that in order to prove the offence under Section 13(1)(d)(ii) of the Act, it must be established that a public servant has abused his position in order to obtain for himself or for any other person, any valuable thing or pecuniary advantage, and that, in this context, the “abuse”



of position must involve a dishonest intention.”

25. Now the evidences have to be seen in the background of aforesaid settled proposition of law to trace out whether the requirements of law have been duly substantiated or not? H.N. Singh happens to be a nucleus of present episode. The whole case moves around him. He was the person from whom allegedly demand was made by the appellant, Prabeen Kumar in lieu of providing favour, from whom Prabeen Kumar accepted the money which was subsequently recovered. Unfortunately, H.N. Singh died before his evidence and so, the direct evidence on that very score is found squalled. In the aforesaid background, now the circumstantial evidence is to be considered.

26. After perusal of the lower court record, as well as hearing rival submissions the following points look pertinent for proper adjudication. (A) with regard to proper identity of H.N. Singh, a bank official, (B) a complaint having been received at Patna Office which was entrusted to the appellant for enquiry facilitating a ground for demand and (C) demand to provide undue advantage followed with acceptance as well as recovery on being trapped misusing his official capacity.

27. During course of consideration of the aforesaid points,



it has been found that prosecution has based upon means of electronic device as well as tape-recorded conversation and majority of the evidences are connected therewith. As such, prime effort should be to reckon the settled principle of law relating thereto.

28. After promulgation of Information Technology Act, 2000, the electronic device began to show its presence in such a way that it became part and parcel of the life and further, so many eventualities in connection therewith, if admitted would constitute a relevant fact, moreover, will also enable the court in properly deciding the issue whereupon the Evidence Act has been amended in order to acknowledge the scientific development, its relevancy, requirement for acceptance. The Apex Court has delved the issue elaborately, explained and during course thereof, laid down the following principles to be followed enabling acceptability of the electronic device in evidence.

29. In *Anvar P.V. v. P.K. Basheer* as reported in (2014)10 SCC 473, it has been held which are as follows:-

7. Electronic record produced for the inspection of the court is documentary evidence under Section 3 of The Indian Evidence Act, 1872 (hereinafter referred to as 'Evidence Act'). The Evidence Act underwent a major amendment by Act 21 of 2000 [The Information Technology Act, 2000 (hereinafter referred to as 'IT Act')]. Corresponding amendments were also introduced in The Indian Penal Code (45 of 1860), The Bankers Books Evidence Act, 1891, etc.

8. Section 22A of the Evidence Act reads as follows:



“22A. When oral admission as to contents of electronic records are relevant.- Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.”

9. Section 45A of the Evidence Act reads as follows: “45A. Opinion of Examiner of Electronic Evidence.-When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000(21 of 2000)., is a relevant fact.

Explanation.--For the purposes of this section, an Examiner of Electronic Evidence shall be an expert.”

10. Section 59 under Part II of the Evidence Act dealing with proof, reads as follows:

“59. Proof of facts by oral evidence.—All facts, except the contents of documents or electronic records, may be proved by oral evidence.”

11. Section 65A reads as follows: “65A. Special provisions as to evidence relating to electronic record: The contents of electronic records may be proved in accordance with the provisions of section 65B.”

12. Section 65B reads as follows:

“65B. Admissibility of electronic records: (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible. (2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely: -

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;



(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause(a) of sub-section (2) was regularly performed by computers, whether –

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,



and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section, -

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment; 9 Page 10

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation: For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.”

These are the provisions under the Evidence Act relevant to the issue under discussion.

13. In the Statement of Objects and Reasons to the IT Act, it is stated thus:

“New communication systems and digital technology have made drastic changes in the way we live. A revolution is occurring in the way people transact business.”

In fact, there is a revolution in the way the evidence is produced before the court. Properly guided, it makes the systems function faster and more effective. The guidance relevant to the issue before us is reflected in the statutory provisions extracted above.

14. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance



with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record 11 Page 12 which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

15. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the



device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

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

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

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

19. It is relevant to note that Section 69 of the Police and Criminal Evidence Act, 1984 (PACE) dealing with evidence on computer records in the United Kingdom was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. Computer evidence hence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The presumption can be rebutted if evidence to the contrary is adduced. In the United States of America, under Federal Rule of Evidence, reliability of records normally go to the weight of evidence and not to admissibility.

20. Proof of electronic record is a special provision introduced by the IT Act amending various provisions



under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete code in itself. Being 15 Page 16 a special law, the general law under Sections 63 and 65 has to yield.

21. In State (*NCT of Delhi*) v. *Navjot Sandhu alias Afsan Gurul* [(2005)11 SCC 600], a two-Judge Bench of this Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerized records of the calls pertaining to the cellphones, it was held at Paragraph-150 as follows:

“150. According to Section 63, secondary evidence means and includes, among other things, “copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies”. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other 1 (2005) 11 SCC 600 16 Page 17 provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65.”

It may be seen that it was a case where a responsible official had duly certified the document at the time of



production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed under Section 65B of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of Section 65B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under Sections 63 and 65, of an electronic record.

22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 17 Page 18 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (*supra*), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

30. Another piece of evidence having produced on behalf of prosecution in line of circumstantial evidence is tape, allegedly relating to conversation having taken place in between H.N. Singh as well as Prabeen Kumar, appellant recorded by H. N. Singh himself and are material exhibits of the record though initially classified as Mark 'A' (first conversation), 'B' (second conversation) and 'C'



(third conversation) out of which Mark 'A' is of dated 09.01.2008 while Mark 'B' and 'C' are of dated 29.01.2008, i.e., date of occurrence.

31. In *S. Pratap Singh v. State of Punjab* reported in *AIR 1964 SC 72*, the Constitution Bench considered the issue and held as follows:-

“15. Before passing on to a consideration of the details of the several allegations there is one matter to which we ought to make reference at this stage and that is the admissibility and evidentiary value of the tape-recorded talks which have been produced as part of his supporting evidence by the appellant. The learned Judges of the High Court without saying in so many terms that these were inadmissible in evidence, this being the contention raised by the respondent State, have practically put them out of consideration for the reason that tape-recordings were capable of being tampered with. With respect, we cannot agree. There are few documents and possibly no piece of evidence which could not be tampered with, but that would certainly not be a ground on which Courts could reject evidence as inadmissible or refuse to consider it. It was not contended before us the tape-recordings were inadmissible. In the ultimate analysis the factor mentioned would have a bearing only on the weight to be attached to the evidence and not on its admissibility. Doubtless, if in any particular case there is a well-grounded suspicion not even say proof, that a tape-recording has been tampered with that would be a good ground for the Court to discount wholly its evidentiary value. But in the present case we do not see any basis for any such suggestion. The tape-recordings were referred to by the appellant in his writ petition as part of the evidence on which he proposed to rely in support of his assertions as regards the substance of what passed between him and the Chief Minister and the members of the latter's family on the several matters which were the subject of allegations in the petition. Before the written statement of the State was filed, the respondent State made an application to the Court on August 23, 1961 in which they averred:



"The respondents are not in a position to give a complete and full reply to the assertions made by the petitioner without inspecting the original records and without knowing and (sic) renderings of the so-called tape-recordings mentioned by the petitioner in his aforesaid petition..... The applicant, therefore, prays that the petitioner may be ordered to place on record..... the renderings of the so called tape-records."

On November 3, 1961 the Court passed an order in which it recorded:

"As regards the renderings of the taperecords, on which the petitioner relies, learned Counsel for the petitioner.... under takes to play the tape recorder before the respondent within a fortnight from the date of the putting in of the above renderings on a date suitable to both the sides."

Again on December 14, 1961 the State made an application to the Court to modify the order dated November 3, 1961 by directing the appellant to play the tape-records in the office of the Counsel for the State and allow the State to retape-record the tape-recordings produced by the appellant's so that a correct copy of the tape-records was available to the respondent-State before filing the written statement. In the applications made by the respondent to the Court for directions regarding the inspection of the tape-records produced by the appellant and seeking the facility for re-recording, it was explicitly stated that this was for the purpose of the State satisfying itself whether the voices of the persons whose talks were purported to have been tape-recorded were truly the voices of those persons. The Court passed an order on January 5, 1962 directing the appellant to file the original tape-records into Court to be sealed in the presence of both the parties and kept in custody of the Registrar of the Court, but this was to be after the records were played before the respondent on January 11, 1962 in the office of the Registrar of the Court. This order was given effect to and the State had the rerecorded copies in their possession to verify the authenticity and correctness of the originals. The written statement of the State was filed in February 1962 only after they had thus their own copies of the taperecords, so that they were in a position to verify (a) whether the voice recorded was that of the person whose voice it professed to be; (b) whether there had been any interpolations or omissions, and (c) whether there had been any other tampering with the records. In the counter-



affidavit filed by the State there was no denial of the genuineness of the tape-records, no assertion that the voices of the persons which were recorded in the tape records were not those which they purport to be or that any portion of the conversation which would have given a different colour to it had been cut off. We should however add that there was a vague statement regarding the tape-record of the talk between the Vigilance Inspector and the appellant with which we shall deal later. It is in the light of these circumstances and this history of the proceedings that the evidence afforded by the tape-recorded talk has to be considered in appreciating the genuineness of the talks recorded and in deciding whether the allegations made by the appellant are substantiated or not.”

32. Propriety as well as admissibility of tape recorded conversation came up for consideration before Constitution Bench in *Yusufalli Esmail Nagree v. State of Maharashtra* as reported in *AIR 1968 SC 147*, it has been held:-

“5. Shaikh was the only eye-witness to the offer of the bribe on August 2, 1960. Mahajan, the radio mechanic and other persons who kept themselves concealed in the inner room of Shaikh's residence did not witness the offer of the bribe, nor did they hear the conversation between Shaikh and the appellant. The High Court was not inclined to accept the evidence of Shaikh, without corroboration. But the High Court found that his evidence was sufficiently corroborated by the tape recorder. The appellant handed over Rs. 100 to Shaikh on August 2, 1960. The contemporaneous dialogue between them formed part of the *res gestae* and is relevant and admissible under S. 8 of the Indian Evidence Act. The dialogue is proved by Shaikh. The tape record of the dialogue corroborates his testimony. The process of tape recording offers an accurate method of storing and later reproducing sounds. The imprint on the magnetic tape is the direct effect of the relevant sounds. Like a photograph of a relevant incident, a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under S. 7 of the Indian



Evidence Act.

6. In *Rup Chand v. Mahabir Parshad*, AIR 1956 Punj 173 a tape record of a former statement of a witness was admitted in evidence to shake the credit of the witness under S. 155 (3) of the Indian Evidence Act. The case was followed in *Manindra Nath v. Biswanath Kundu*, (1963) 67 Cal WN 191. In *S. Pratap Singh v. State of Punjab*, 1964-4 SCR 733: (AIR 1964 SC 72) the tape record of a conversation was admitted in evidence to corroborate the evidence of witnesses who had stated that such a conversation had taken place. In *R. v. Maqsd Ali*, (1965) 2 All ER 461, a tape record of a conversation was admitted in evidence, though the only witness who overheard it was not conversant with the language and could not make out what was said. If a statement is relevant an accurate tape record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. One of the features of magnetic tape recording is the ability to erase and re-use the recording medium. Because of this facility of erasure and re-use, the evidence must be received with caution. The court must be satisfied beyond reasonable doubt that the record has not been tampered with.

7. The radio mechanic did not hear the conversation but he proved that the tape recorded all the sounds produced in the room where only Shaikh and the appellant were present. The voices of the appellant and Shaikh were properly identified. The tape was not sealed and was kept in the custody of Mahajan. The absence of sealing naturally gives rise to the argument that the recording medium might have been tampered with before it was replayed. However, It was not suggested either in the cross examination of the prosecution witnesses or in the answers under S. 342, Criminal Procedure Code, that any tampering had taken place with the recording. While admitting the accuracy of material parts of the conversation reproduced by the tape recorder, the appellant in his examination under S. 342 attempted to explain the conversation and the object of his visit and said that he had gone to Shaikh's residence for obtaining, repayment of a loan of Rs. 100 which he had advanced to Shaikh on July 19, 1960. The High Court rejected the appellant's explanations. Mr. Mistry was right in saying that the High Court could not accept the



inculpatory part and reject the exculpatory part of the appellant's answers under S. 342. But there was over evidence showing that the tape recording was not tampered with. The fact that the defence did not suggest any tampering lends assurance to the credibility of the other evidence. The courts below rightly held that the tape recorder faithfully recorded and reproduced the actual conversation.

8. xxx xxx

9. Counsel claimed protection under Art. 20 (3) of the Constitution against the use of the statements made by the appellant on August 2, 1960. He argued that by the active deception of the police, the appellant was compelled to be a witness against himself. Had the appellant known that the police had arranged a trap, he would not have talked as he did. Compulsion may take many forms. A person accused of an offence may be subject to physical or mental torture. He may be starved or beaten and a confession may be extorted from him. By deceitful means he may be induced to believe that his son is being tortured in an adjoining room and by such inducement he may be compelled to make an incriminating statement. But we cannot say that in this case the appellant was compelled to be witness against himself. He was free to talk or not to talk. His conversation with Shaikh was voluntary. There was no element of duress, coercion or compulsion. His statements were not extracted from him in an oppressive manner or by force or against his wishes. He cannot claim the protection of Art. 20 (3). The fact that the tape recording was done without his knowledge is not of itself an objection to its admissibility in evidence. In saying so, the Court does not lend its approval to the police practice of tapping telephone wires and setting up hidden microphones for the purpose of tape recording.

33. *N. Sri Rama Reddy v Shri Abdul Ghani Dar and*

others reported in *AIR 1971 SC 1162* it has been observed as follows:-



11. In this connection counsel relied upon Section 146, Exception 2 to Section 153 and Clause (3) of Section 155 of the Evidence Act. Section 146 deals with questions lawful in cross-examination and, in particular, Clause (1) thereof provides for a witness being cross-examined by questions being put to him which tend to test his veracity. Section 153 generally deals with exclusion of evidence to contradict answers to questions testing veracity, but exception 2 states that if a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted. Section 155 deals with impeaching the credit of witness by the various ways dealt with in Clauses (I) to (4). One of the ways by which the credit of a witness may be impeached is dealt with in Clause (3) and that is by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. Mr. Daphtary pointed out that Section 146 must be read with Section 153. W. cannot accept this contention in its entirety. It may be that Clause (3) of Section 146 may have to be read along with the main Section 153 but Cl. (1) of Section 146 and exception (2) to Section 153 deal with different aspects. Under Section 146 (1) questions may be put to a witness in cross-examination to test his veracity and, under Exception 2 to Section 153 a witness may be contradicted when he denies any question tending to impeach his impartiality. The object of the election petitioner to adduce the tape-recorded conversation as evidence is to impeach the testimony of the witness that he has never seen the pamphlet and that he has never attempted to induce the election petitioner not to file the election petition on threat of serious consequences, and to establish that the evidence given in Court is quite contrary to the statements made by him in the conversation that he had with Abdul Ghani Dar and which has been recorded on tape.

12. We will now refer to the case law on the subject. In *Hopes v. H. M Advocate*, (1960) Scots Law Times 264 a tape-recorded conversation which took place between a complainant and a blackmailer was played before the jury and sought to be put in evidence by a police officer who had listened to the conversation as it was transmitted through the loudspeaker. Objections were raised to the admissibility of the said evidence. The learned triad Judge overruled the objection as follows :



"New techniques and new devices are the order of the day. I can't conceive, for example, of the evidence of a ship's captain as to what he observed being turned down as inadmissible because he had used a telescope, any more than the evidence of what an ordinary person sees with his eyes becomes incompetent because he was wearing spectacles. Of course, comments and criticisms can be made, and no doubt will be made, on the audibility or the intelligibility, or perhaps the interpretation, of the results of the use of a scientific method, but that is another matter, and that is a matter of value, not of competency. The same can be said of visual observation by a witness who says he sees something; his evidence can be criticised because of his sight or because of the sort of glasses he is wearing, and so on, but all these matters are matters of value and not of competency."

Accordingly, the learned Judge allowed the police officer to give evidence as to what he heard on the tape recorder, which was played before the Jury.

13. On appeal to the High Court of Judiciary, it is seen that no objection appears to have been taken to the competency of the evidence furnished by the tape-recorder but the admissibility of the evidence of the police officer based upon his hearing of the tape-recorded conversation was objected to. This objection was over ruled by the High Court of Judiciary stating that it is competent for the police officer to give evidence of conversation which he hears with the help or hearing aid or. as in the case before them, when the conversation is transmitted to him over a distance by wireless and that there may be criticism of the quality of his evidence and not about the competency of the evidence of what he has heard. The Court further observed at p. 267:

"The Inspector's evidence of the conversation was as much primary evidence as the evidence from the replaying of the tape recorded. Each received it at the same time, the one recording it in the human memory the other upon a piece of tape".

From the above decision it is apparent that the tape itself is primary and direct evidence admissible as to what has been said and picked up by the recorder.

14. In *R. v Mills*, (1962) 3 All ER 298 a conversation which had been recorded on tape between two of the persons was heard by a police officer who gave evidence that he has himself remembered the various



remarks which passed between those two persons which could be corroborated by the conversation recorded on the tape. But the tape recording itself was not introduced in evidence nor was there any production of the record by consent before the Jury. They referred to the decision of the High Court of Judiciary in Hopes' Case, (1960) Scots Law Times 264 and held that according to the said decision the tape-recorded conversation was admissible as direct evidence. Though the discussion in the Judgment shows that a tape-recorded conversation is admissible in evidence, ultimately the Court left open the question stating:

"The Court has not debated, and is not deciding any broad and general question of principle whether evidentiary material obtained by the use of a tape-recorder without the concurrence of a human being listening to the same sounds is admissible or is not admissible in evidence in a criminal trial".

But it is significant to note that the Court of Criminal Appeal rejected the contention of the counsel for the accused that there has been any question of introduction of hearsay evidence at the trial by the evidence of the police officer giving evidence after refreshing his memory from the tape.

15. The question again directly arose in *R. v. Masqud Ali*, (1965) 2 All ER 464. In that case a conversation which took place in Punjabi dialect between two persons and which had been recorded on the tape was played before the jury and was admitted in evidence by the trial Judge. Objection was taken before the Court of Criminal Appeal regarding the admissibility in evidence of the tape-recorded conversation between the accused. Therefore the point that specifically arose before the Court of Appeal was 'Is a tape recording as such admissible in evidence, as a matter of law?' After referring to the observations in *Mills' Case*, (1962) 3 All ER 298, the appellate Court noted that the question regarding the admissibility of a tape record was not actually decided in that case. The decision of the High Court of Judiciary in Hopes' Case. (1960) Scots Law Times 264 was referred to and it was noted that the evidence of the police officer who listened to the tape recorder was held to be admissible. The Court said, at p. 469 :

"We think that the time has come when this Court should state its views of the law on a matter which is likely



to be increasingly raised as time passes. For many years now photographs have been admissible in evidence on proof that they are relevant to the issues involved in the case and that the prints are taken from negatives that are untouched. The prints as seen represent situations that have been reproduced by means of mechanical and chemical devices. Evidence of things seen through telescopes or binoculars which otherwise could not be picked up by the naked eye have been admitted and now there are devices for picking up, transmitting and recording, conversations. We can see no difference in principle between a tape recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this Court wrong to deny, to the law of evidence advantages to be gained by new techniques and new devices provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged".

In consequence, the Court held that the tape-recorded conversation was admissible in evidence, subject to the limitations mentioned in the above extract

16. It will therefore be seen that though the question of admissibility of a tape-recorded conversation had been left open in *Mills' Case*, (1962) 3 All ER 298, the same was specifically considered and decided affirmatively in *Maqsd Ali's Case*. (1965) 2 All ER 464.

17. Before we deal with decisions of this Court bearing on this point, it is necessary to advert to two decisions, one of the Punjab High Court and the other, of the Calcutta High Court. In *Rup Chand v. Mahabir Parshad*, AIR 1956 Punj 173 the defendant, in answer to a suit for recovery of a certain sum of money on the basis of a promissory note, put forward a plea that the original promissory note containing certain endorsement had been destroyed and had been replaced by another promissory note bearing the same date. The defendant attempted to substantiate this plea by the oral testimony of a broker but



the latter declined to support him. The defendant requested the Court to permit to confront the broker witness with the conversation which had taken place between himself and the broker in regard to the destruction of the earlier promissory note and which had been faithfully recorded on a tape-recorder. The plaintiff objected to the admissibility of the evidence by tape recorder, but the trial Court overruled the objection. In the revision taken before the High Court by the plaintiff, the order of the trial Court was confirmed. The High Court relied upon Section 155 (3) of the Evidence Act and held that as the broker appearing as a witness in the case before it had made a statement to the defendant on a former occasion which was at variance with the statement made by him before the Court, there can be no doubt that the defendant could establish that a previous statement which was contradictory to the evidence given before the Court was made by the witness to him, Dealing with the question whether a record of such a previous statement, as prepared by a scientific instrument, could be produced in Court as evidence, the High Court held that such a tape-recorded statement was admissible in evidence, and observed as follows :

"I am aware of no rule of evidence which prevents a defendant who is endeavouring to shake the credit of a witness by proof of former inconsistent statements, from deposing that while he was engaged in conversation with the witness a tape recorder was in operation, or from producing the said tape recorder in support of the assertion that a certain statement was made in his presence".

This decision lays down two propositions: (i) that a tape-recorded conversation is admissible in evidence and that (ii) if it contains a previous statement made by a witness, it can be used to contradict the evidence given before the Court.

18. In *Manindra Nath v. Biswanath*, (1963) 67 Cal WN 191 the Calcutta High Court had to consider whether a defendant was entitled to adduce in evidence a previous statement of the plaintiff and recorded on the tape to contradict the plaintiff's evidence given before the Court and held that the tape-recorded conversation was admissible in evidence and the previous statement recorded therein could be used to contradict the evidence given before the court. After referring to *Rup Chand's Case*, AIR 1956 Punj 173, the Court observed at p. 192:



"If the plaintiff, while he is in the witness box, makes a statement which is at variance with a statement previously made by him, the plaintiff may be asked whether he made such previous statement and if he denies having made the previous statement, such previous statement may be proved by the defendant. There, as in this case, it is alleged that the previous statements of the plaintiff were recorded in a tape-recorder, those statements may be admitted in evidence, if it is proved that they were made by the plaintiff and that the instrument accurately recorded those statements. The fact that the statements were recorded in a tape-recorder and the recording was made behind the back and without the knowledge of the plaintiff is by itself no objection to the admissibility of the evidence".

There are two decisions of this Court bearing on this matter *S. Pratap Singh v. The State of Punjab*, (1964) 4 SCR 733 = (AIR 1964 SC 72) and *Yusuffalli v. State of Maharashtra*, (1967) 3 SCR 720 = (AIR 1968 SC 147).

19. In *Pratap Singh's* case, (1964) 4 SCR 733 = (AIR 1964 SC 72) it has been held that rendering of a tape-recorded conversation can be legal evidence by way of corroborating the statement of a person who deposes that the other speaker and he carried on the conversation and even of the statement of a person who may depose that he overheard the conversation between the two persons and what they actually stated had been tape-recorded that weight to be given to such evidence will depend on the other facts which may be established in a particular case. Though there was a difference of opinion in the majority and minority judgments regarding certain other aspects which arose for consideration, so far as the admissibility of a tape-recorded conversation in evidence, all the Judges appear to have been unanimous in the view that it was admissible. But it must be noted that in the majority judgment it is stated that it was not contended on behalf of the State that the tape-recordings were inadmissible. Similarly, in the minority judgment also it is observed that tape-recordings can be legal evidence by way of corroborating the statements of a person who deposes that the speaker and he carried on that conversation and, as it had not been held by the trial Court that the record of a conversation on tape is not admissible in evidence for any purpose it was not necessary to pursue the matter further.

20. In *Yusuffalli's* case, (1967) 3 SCR 720 = (AIR



1968 SC 147) the question was whether a conversation between the complainant and a person, who later figured as an accused on a charge of offering bribe, and recorded on tape was admissible in evidence. It is seen from the decision of this Court that the tape recorder was played in Court at the trial of the accused. This Court held that the evidence of the complainant was sufficiently corroborated by the tape-recorder and observed at p. 723:

"The contemporaneous dialogue between them formed part of the resgestae and is relevant and admissible under Section 8 of the Indian Evidence Act. The dialogue is proved by Shaikh. The tape record of the dialogue corroborates his testimony. The process of tape recording offers an accurate method of storing and later reproducing sounds. The imprint on the magnetic tape is the direct effect of the relevant sounds. Like a photograph of a relevant incident, a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under Section 7 of the Indian Evidence Act".

Reference was made, with approval, to the decision of the Punjab and Calcutta High Courts in *Rup Chand's* case, AIR 1956 Punj 173 and *Manindra Nath's* case, (196:3) 67 Cal WN 191 and also to the earlier decision of this Court in *Pratap Singh's* Case, (1964) 4 SCR 733 = (AIR 1964 SC 72) where a tape recorded conversation had been admitted in evidence. The decision in *Maqsum Ali's* Case, (1965) 2 All ER 464 was also quoted with approval.

21. In particular, it will be noted that this Court, in the said decision, approved of the decision of the Punjab High Court in *Rup Chand's* Case, AIR 1956 Punj 173, holding that tape recording of a former statement of a witness can be admitted in evidence to shake the credit of the witness under Section 155 (3) of the Evidence Act

22. Having due regard to the decisions referred to above, it is clear that a precious statement, made by a person and recorded on tape, can be used not only to corroborate the evidence given by the witness in Court but also to contradict the evidence given before the Court, as well as to test the veracity of the witness and also to impeach his impartiality. Apart from being used for corroboration, the evidence is admissible in respect of the other three last-mentioned matters, under Section 146 (1), Exception 2 to Section 153 and Section 155 (3) of the Evidence Act. Therefore it is not possible for us to accept



the contention of Mr. Daphtary that the previous statement can be used only for purposes of corroboration but not for the purpose of contradicting the evidence given before the Court. If a previous statement made by a person can be used to corroborate his evidence given before the Court, on principle, we do not see any reason why such previous statement cannot be used to contradict and also for the other purposes referred to above. In particular the fact that the decisions of the Punjab and Calcutta High Courts in Rup Chand's case, AIR 1956 Punj 173 and Manindra Nath's case, (1963) 67 Cal WN 191 where the previous statements have been used to contradict the evidence given before the Court has been approved by this Court in Yusufalli's Case, (1967) 3 SCR 720 = (AIR 1968 SC 147) clearly establishes that the contention of Mr. Daphtary that the previous statement cannot be used to contradict the evidence given before the Court cannot be accepted. As pointed out already, Mr. Daphtary has not challenged the correctness of the decision in Yusufalli's Case, (1967) 3 SCR 720 = (AIR 1968 SC 147) Therefore the first ground of objection raised by Mr. Daphtary will have to be overruled.

34. In *R.M. Malkani v. State of Maharashtra* reported in (1973)1 SCC 471, it has been held as follows:-

“23. Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape-record. A contemporaneous tape-record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is *res gestae*. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible under Section 7 of the Evidence Act. The conversation between Dr. Motwani and the appellant in the present case is relevant to the matter in issue. There is no dispute about the identification of the voices. There is no controversy about any portion of the conversation being erased or mutilated. The appellant was given full opportunity to test the genuineness of the tape recorded



conversation. The tape recorded conversation is admissible in evidence.

24. It was said by counsel for the appellant that the tape recorded conversation was obtained by illegal means. The illegality was said to be contravention of Section 25 of the Indian Telegraph Act. There is no violation of section 25 of the Telegraph Act in the facts and circumstances of the present case. There is warrant for proposition that even if evidence is illegally obtained it is admissible. Over a century ago it was said in an English case where a constable searched the appellant illegally and found a quantity of offending article in his pocket that it would be a dangerous obstacle to the administration of justice if it were held, because evidence was obtained by illegal means, it could not be used against a party charged with an offence. See *Jones v. Owen* (1870) 34 J. P. 759. The Judicial Committee in *Kuruma, Son of Kanju v. R.* 1955 A.C. 197 dealt with the conviction of an accused of being in unlawful possession of ammunition which had been discovered in consequence of a search of his person by a police officer below the rank of those who were permitted to make such searches. The Judicial Committee held that the evidence was rightly admitted. The reason given was that if evidence was admissible it matters not how it was obtained. There is of course always a word of caution. It is that the Judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence.

25. This Court in *Magraj Patodia v. R. K. Birla*, AIR 1971 SC 1295 dealt with the admissibility in evidence of two files containing numerous documents produced on behalf of the election petitioner. Those files contained correspondence relating to the election of respondent No. 1. The correspondence was between respondent No. 1 the elected candidate and various other persons. The witness who produced the file said that respondent No. 1 handed over the file to him for safe custody. The candidate had apprehended raid at his residence in connection with the evasion of taxes or duties. The version of the witness as to how he came to know about the file was not believed by this Court. This Court said that a document which was procured by improper or even by illegal means could not bar its admissibility provided its relevance and genuineness



were proved.

26. In Nagree's case, (1967) 3 SCR 720 = (AIR 1968 SC 147) (supra) the appellant offered bribe to Sheikh a Municipal Clerk. Sheikh informed the Police. The Police laid a trap. Sheikh called Nagree at the residence. The Police kept a tape recorder concealed in another room. The tape was kept in the custody of the police inspector. Sheikh gave evidence of the talk. The tape record corroborated his testimony. Just as a photograph taken without the knowledge of the person photographed can become relevant and admissible so does a tape-record of a conversation unnoiticed by the talkers. The Court will take care in two directions in admitting such evidence. First, the Court will find out that it is genuine and free from tampering or mutilation. Secondly, the Court may also secure scrupulous conduct and behaviour on behalf of the Police. The reason is that the Police Officer is more likely to behave properly if improperly obtained evidence is liable to be viewed with care and caution by the Judge. In every case the position of the accused the nature of the investigation and the gravity of the offence must be judged in the light of the material facts and the surrounding circumstances.

26A. The admissibility of evidence procured in consequence of illegal searches and other unlawful acts was applied in a recent English decision in *R. v. Maqsd Ali*, (1965) 2 All E.R. 464. In that case two persons suspected of murder went voluntarily with the Police Officers to a room in which, unknown to them, there was a microphone connected with a tape-recorder in another room. They were left alone in the room. They proceeded to have a conversation in which incriminating remarks were made. The conversation was recorded on the tape. The Court of Criminal Appeal held that the trial Judge had correctly admitted the tape-recording of the incriminating conversation in evidence. It was said "that the method of the informer and of the eavesdropper is commonly used in the detection of crime. The only difference here was that a mechanical device was the eavesdropper". The Courts often say that detection by deception is a form of police procedure to be directed and used sparingly and with circumspection.

27. When a Court permits a tape recording to be played over it is acting on real evidence if it treats the



intonation of the words to be relevant and genuine. The fact that tape recorded conversation can be altered is also borne in mind by the Court while admitting it in evidence.

28. In the present case the recording of the conversation between Dr. Motwani and the appellant cannot be said to be illegal because Dr. Motwani allowed the tape recording instrument to be attached to his instrument. In fact, Dr. Motwani permitted the Police Officers to hear the conversation. If the conversation were relayed on a microphone or an amplifier from the telephone and the police officers heard the same they would be able to give direct evidence of what they heard. Here the police officers gave direct evidence of what they saw and what they did and what they recorded as a result of voluntary permission granted by Dr. Motwani. The tape recorded conversation is contemporaneous relevant evidence and therefore it is admissible. It is not tainted by coercion or unfairness. There is no reason to exclude this evidence.

29. It was said that the admissibility of the tape recorded evidence offended Arts. 20 (3) and 21 of the Constitution. The submission was that the manner of acquiring the tape recorded conversation was not procedure established by law and the appellant was incriminated. The appellant's conversation was voluntary. There was no compulsion. The attaching of the tape recording instrument was unknown to the appellant. That fact does not render the evidence of conversation inadmissible. The appellant's conversation was not extracted under duress or compulsion. If the conversation was recorded on the tape it was a mechanical contrivance to play the role of an eavesdropper. In *R. v. Leatham*, (1861) 8 Cox C.C. 198 it was said "It matters not how you get it if you steal it even it would be admissible in evidence", as long as it is not tainted by an inadmissible confession of guilt: evidence even if it is illegally obtained is admissible.

30. There is no scope for holding that the appellant was made to incriminate himself. At the time of the conversation there was no case against the appellant. He was not compelled to speak or confess. Article 21 was invoked by submitting that the privacy of the appellant's conversation was invaded. Article 21 contemplates procedure established by law with regard to deprivation of life or personal liberty. The telephonic conversation of an innocent citizen will be protected by Courts against



wrongful or high handed interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants. It must not be understood that the Courts will tolerate safeguards for the protection of the citizen to be imperilled by permitting the police to proceed by unlawful or irregular methods. In the present case there is no unlawful or irregular method in obtaining the tape recording of the conversation.

31. The second contention on behalf of the appellant was that the entire tape recorded conversation is within the vice of Section 162 of the Criminal Procedure Code. In aid of that contention the oral evidence of Mugwe, the Director of Intelligence Bureau was relied on. Mugwe said that it was under his advice and instruction that Dr. Motwani started talking with the appellant and Dr. Adatia. Therefore, it was said that the tape recording was in the course of investigation. Sections 161 and 162 of the Criminal Procedure Code indicate that there is investigation when the Police Officer orally examines a person. The telephonic conversation was between Dr. Motwani and the appellant. Each spoke to the other. Neither made a statement to the Police Officer. There is no mischief of S. 162.

32. The third contention was that the appellant did not attempt an offence. The conversation was said to show bargain. The evidence is that the patient died on 13 May, 1964. Dr. Motwani saw the appellant on 3 October, 1964. The appellant demanded Rupees 20,000. The appellant asked for payment of Rs. 20,000 in order that Dr. Adatia would avoid inconvenience and publicity in newspapers in case inquest was held. Dr. Motwani informed Dr. Adatia about the conversation with the appellant. On 4 October, 1964 the appellant rang up Dr. Motwani and said that he was willing to reduce the amount to Rs. 10,000. On 5 October, 1964 Dr. Adatia received calls from the appellant asking him to attend the Coroner's Court on 6 October, 1964. Dr. Adatia got in touch with Dr. Motwani on 6 October and gave him that message. Dr. Adatia rang up the appellant on 6 October and asked for adjournment. The appellant granted the adjournment to 7 October. On 6 October there were two calls from the appellant asking Dr. Adatia to attend the Coroner's Court on 7 October and also that Dr. Adatia should contact the appellant on 6 October. Dr. Motwani rang up the appellant and told him that the



telephonic conversation had upset Dr. Adatia. On 6 October Dr. Motwani conveyed to Mugwe, Director of Intelligence Bureau about the demand of bribe to the appellant. These are the facts found by the Court. These facts prove that the offence was committed.

35. In *All India Anna Dravida Munnetra Kazhagam v.*

L.K. Tripathi as reported in (2009) 5 SCC 417, it has been held as follows:-

“76 . The law on the admissibility of tape recorded versions is well settled. In *Ram Singh and others v. Col. Ram Singh* [1985 (Supp) SCC 611] Fazal Ali, J., with whom Sabyasachi Mukharji, J., agreed, laid down the following tests for determining the admissibility of tape recorded version :

1. The voice of the speaker must be identified by the maker of the record or other persons recognizing his voice. Where the maker is unable to identify the voice, strict proof will be required to determine whether or not it was the voice of the alleged speaker.

2. The accuracy of the tape-recorded statement must be proved by the maker of the record by satisfactory evidence: direct or circumstantial.

3. Possibility of tampering with, or erasure of any part of, the tape-recorded statement must be totally excluded.

4. The tape-recorded statement must be relevant.

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

6. The voice of the particular speaker must be clearly audible and must not be lost or distorted by other sounds or disturbances.

77.. In *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra and others* [(1976) 2 SCC 17], a three-Judge Bench while considering the question whether the appellant was guilty of promoting feeling of enmity between two sections of the society, examined the question of admissibility of tape recorded speech, referred to the



judgment in R. v. Maqsud Ali [(1965) 2 All ER 464] and observed :

"19. We think that the High Court was quite right in holding that the tape-records of speeches were "documents", as defined by Section 3 of the Evidence Act, which stood on no different footing than photographs, and that they were admissible in evidence on satisfying the following conditions :

(a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.

(b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.

(c) The subject-matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act."

36. Point no. (A). So far ascertainment of proper identity of H.N. Singh is concerned, that is found duly exposed by PW No.10, Arun Kumar Srivastava as well as PW-18, Ravi Bhushan Sahay, UCO Bank Officials who identified H.N. Singh to be Branch Manager of UCO Bank, Giddhaur Branch. He had also exhibited (Ext-29) which was submitted at his end to CBI, who called for a report with regard to pendency of any sort of enquiry against H.N. Singh or not. No cross-examination has been made at the end of appellant to controvert the identity of H.N. Singh and so, it is found conclusively that H.N. Singh was an employee of UCO Bank, Giddhaur Branch who at the relevant time was posted as Branch Manager.

37. Point No. (B), it is evident from the lower court record



that PW-7, Arjun Prasad, PW-8 Surendra Rajak, PW-25, Dinendra Kashyap along with different exhibits are on this score. PW-8 had stated that he was posted as clerk at CBI office, Patna. He was attached with confidential Section of Superintendent of Police, CBI, Patna. He had further detailed manner of complaint being received at their end and further, its entry in the temporary complaint register till passing of verification order which, at the relevant time, he was maintaining. Then he had exhibited the relevant entry made at page no.164 on the basis of complaint received from DIG, CBI, Patna (Ext-14), he also exhibited the complaint petition containing endorsement made by the then DIG, Praveen Sinha which was received by the then Superintendent of Police, Dinendra Kashyap. He also exhibited relevant letters which he had typed after taking dictation from Superintendent of Police, CBI whereby the complainant was called for at first instance, for verification. As the complainant failed to turn up, on account thereof, he had placed the file with a note sheet that the allegation should be verified through deputing I.O. for collecting the source information which he had also exhibited. The then Superintendent of Police, Dinendra Kashyap had entrusted the appellant, Prabeen Kumar for verification and report, which has also been exhibited as Ext-17/1 whereupon he had handed over photo copy of complaint petition, order of Superintendent of Police, copy of the



note-sheet to the appellant/accused Prabeen Kumar after taking his signature over the relevant issuing register which he had also exhibited as Ext-17/2. The aforesaid complaint was made by one Dharmendra Kumar Singh, an Ex-President of BJP, Giddhaur Block and a copy thereof, was also sent to the DIG Vigilance, Patna and from there, the aforesaid complaint was sent to DIG, CBI. He had further exhibited his signature over seizure list relating to Ext-16 series, that means to say, temporary complaint register, note sheet, complaint petition, office note book. During cross-examination, it is evident that this witness was not at all cross-examined challenging the signature of Prabeen Kumar over the issuing register and in likewise manner, there happens to be no denial even by way of suggestion that the entries whatsoever been made in the issuing register addressed to appellant happens to be managed one and these documents have purposely been manufactured without having real identity and in likewise manner, the signature of Prabeen Kumar (Ext-17/2) happens to be a forged one. Moreover, from the evidence, it is crystal clear that complaint had not originated at the CBI, Patna level rather it was sent by DIG, Vigilance whereupon subsequent action visualized.

38. PW-25, Dinendra Kashyap, the then Superintendent of Police, CBI, Patna had substantiated the evidence of PW-8 while acknowledging his status to be attached with his confidential Section



and in likewise manner, reaffirmed the relevant exhibits including receipts of the relevant complaint from the office of DIG, CBI with an endorsement of the DIG, CBI, his activity as well as entrustment to inspector, Prabeen Kumar to verify the allegation which, the inspector had received on 07.02.2007(Ext-17/2) and the fact that aforesaid Prabeen Kumar did not submit verification report.

39. From his cross-examination, it is evident that this witness was also not questioned over the entrustment to Prabeen Kumar (appellant) regarding verification of the allegation rather his status has been challenged on the basis of Ext-‘D’, CBI Manual whereunder he was not at all competent enough to entrust verification as made under Chapter VI, Annexure-6A.

40. At this juncture, evidence of PW-26 VPS Mann appears to be relevant who along with some of the members of raiding party with independent witnesses had conducted raid in the office of appellant wherefrom the complaint, as disclosed by PW-8, was recovered from a drawer of the table and for that Ext-40 Series has been prepared bearing his signature. Again this witness has been left out to be cross-examined so far recovery part is concerned, however, it has been tested under para-23. Signature of appellant has also been brought up on record by PW-22 by way of exhibiting attendance register (Ext-31), and signature has been tested by the handwriting



expert (PW 13), who during cross-examination has been tested on that score, save and except, his status as well as education qualification.

41. So concluding on this score, it is evident that prosecution has succeeded in proving that appellant has got a ground to advance illegal demand from H.N. Singh against whom he was directed by the Superintendent of Police, CBI to verify the allegation and report vide order dated 08.02.2007 and the same remained pending at his end till the day of his apprehension.

42. Point No. C., Non examination of H.N. Singh is admitted one.

43. It is not the case of either of the parties that complainant H.N. Singh was withheld to be examined during course of trial rather the unfortunate scene appeared on account of death of H.N. Singh and that being so, the direct evidence in terms of Section 60 of the Evidence Act, certainly lacks. Now, the evidence whatever been adduced by the prosecution is to be scrutinized in order to trace out whether the prosecution has succeeded in proving the demand, acceptance of bribe and recovery of tainted money from the possession of the appellant.

44. During course of appreciation of the evidence, it is found that two kinds of evidences have been adduced, the first one, electronic evidence and the second, oral evidence. So far electronic



evidence is concerned, that relates to call details having in between H.N. Singh and the appellant, and further, those commenced after entrustment of verification to the appellant. At the present moment, it looks pertinent to mention here that there happens to be no denial at the end of the appellant to have possessed SIM No. 9430888043 allotted to the appellant through the department substantiated by PW-2 which was also seized during course of personal search of the appellant and substantiated by PW-26 VPS Mann. From the evidence of PW-4, a Nodal Officer of AIRTEL disclosing SIM No. 9931264869 allotted to H.N. Singh. The call details from 1.12.2007 to 29.01.2008 relating to SIM No. 9430888043 having been substantiated by PW-3 and an exhibit of the record (Ext-5) is corroborative in nature. The call details disclose that call was received over SIM No. 9430888043 from landline phone bearing no. 0634852551027 on 24.12.2007 and 04.01.2008 as well as was made over Mobile No. 9931264869 on 09.01.2008 (thrice) vice versa as well as 29.01.2008. (twice) at 2.40 PM as well as 4.39 PM. From cross-examination, it is apparent that this PW has been cross-examined over timing only, however dates are beyond controversy in order to contradict the timing of call, made by H.N. Singh or by the appellant to H.N. Singh, but the fact remains that call was made on the so specified date. As call has not been controverted, on account



thereof, it is found beyond controversy save and except timing.

45. Evidence of PW-4 is also to be taken into consideration in its continuity, who under his signature had submitted call details of SIM No. 9931264869 (H. N. Singh) from 1st January 2008 to 8th June 2008 (Ext-6) and the call details speaks regarding outgoing on 09.01.2008 at 2:11.34 PM, 3:55.05 PM, 4.29 PM incoming, 4:45.46 incoming relating to SIM No. 9430888043 (Prabeen Kumar) and in likewise manner on 26.01.2008 at 1.56 incoming, on 29.01.2018 at 12.58.10 outgoing, 4.36.12, 4.35.39 incoming, that being so, conversation in between the respective persons (H.N. Singh as well as Prabeen Kumar) is found duly substantiated which did not been put under challenge.

46. So far its admissibility is concerned, it is apparent that each page of the call details bears certification at the end of the respective witnesses with a further discloser that it has been prepared through computer whereupon, it satisfies the requirement having prescribed under Section 65B(4) of the Evidence Act and so, fulfils the ingredients having laid down by the Hon'ble Apex Court in **Anvar P.V. v. P.K. Basheer(supra)** whereupon found admissible.

47. Furthermore, it is evident that the seizure witnesses, who are independent one, namely, Kalpesh as well as Vishwajit, the employees of Central Ground Water Board, Patna spared by their



controlling authority as per request made by PW-26 and examined as PWs-11 and 12 who had deposed that after having been ordered by his departmental head (exhibit) they accompanied VPS Mann (PW 26) to the Hotel Mayur where other members of CBI were present and in their presence, apart from disclosure having been made by H.N. Singh regarding demand having been made by the appellant, he also disclosed that they had recorded conversation and at that very moment, he (H.N. Singh) produced cassette which was played (Marked 'A') and they had heard and found specifically demand having been advanced at the end of appellant. It is surprising that PW-11, Kalpesh was not at all cross-examined on that very score nay PW-12, Vishwajit who , though cross-examined relating to two other cassettes marked "B" and "C" but not relating to Marked "A" (Material Ext-11). From the evidence of PW-11, PW-12, it is further evident that request at the end of appellant to play the cassette marked "B" and "C" in court was considered and having been played but no such prayer or attempt was taken at the end of appellant relating to cassette marked "A. Had there been a genuine conduct at the end of the appellant, the cassette marked "A" (Material Ext-11) would have also been played in the Court in spite of having its transcription Ext-'A'/ Material Ext-11(Marked 'A') to demolish the event of demand which was more pertinent in the background of Section 20 of the



Prevention of Corruption Act allowing presumption against the accused. All the cassettes were also directed to be played in court in presence of learned respective counsels, though, on account of efflux of time, certain complication arose, but during course thereof, marked 'C' was not audible while A. B. were very much clear.

48. Evidence of PW-11 Kalpesh Kumar Sinha who was assigned with in form of shadow witness, has also to be looked into over the activity of the appellant which has been properly detailed under paras-6,7 (twice), 8, 9 over which no cross-examination has been made. From his cross-examination, it is clear that the same has been confined relating to cassette Marked 'B' and 'C' only. So far PW-12 is concerned, he was along with trap party at the relevant time, and he along with PW-11 so explained post trap event, during course of which he along with PW-11 stood witness over search and seizure, which has not been challenged by the appellant during cross-examination.

49. Apart from PWs-11 and 12, PW-19, PW-26 are also on this score. While PW-19 was not at all cross-examined on this score but PW-26 has been cross-examined and at para-19, he had deposed that he had not recorded voice sample of H.N. Singh for scientific examination. On the other hand, voice of appellant was taken in presence of PW-15 and PW-16 which was duly testified by PWs, 14



and 17. Because of the fact that the genuineness of cassette Ext-11 has not been challenged while cross-examining the aforesaid two witnesses nor any sort of infirmity has been found relating thereto, on account thereof, the authenticity of cassette Ext-11, could not be doubted. Furthermore, from the deposition of the witnesses, it is also evident that H.N. Singh had produced cassette before them claiming the same recorded by him (conversation in between him as well as Prabeen Kumar) which was played in their presence and heard by them and then, preparing its transcription, sealed coupled with the fact that same were produced in court in duly sealed condition, thereafter is also found non controverted. In due course of investigation, voice was scientifically examined with the sample of voice that of appellant.

50. As visible the appellant did not challenge the voice is not of him in like wise manner, its reliability challenging voice of H.N. Singh, and further, claiming the same to be duly tampered.

51. Material exhibit-VIII is the cassette Marked 'B' which did not specifically match with its transcription but that is not going to dent as appellant did not controvert his presence during course of conversation. However, it is the original tape which has got relevancy and not its transcription. Moreover, when the same is considered in the background of call details, there happens to be no scope of doubt. In the aforesaid background, if both the material exhibits are taken



together, it certainly completes the link. However, so far material exhibit-IX, Mark 'C' Cassette is concerned, it did not fulfil the criteria as not properly audible.

52. Consequent thereupon, there happens to be reliable evidence available on record relating to demand.

53. In *Gian Chand & others v. State of Haryana* reported in **2013(4) PLJR 7 (SC)** it has been held:-

11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in *Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors.*, **AIR 2013 SC 1204** observing as under:

“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be



believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”

54. Before coming to the subsequent stage, in order to properly appreciate the same, let the theme be recapitulated, the status of H.N. Singh being Branch Manager of UCO Bank, Gidhaur Branch, the allegations attributed to him sailed through different heads, entrustment to appellant for verification, non submission of verification report till the date of trap/arrest, demand of bribery for favourable report.

55. As is evident, there happens to be admission at the end of the appellant during course of statement recorded under Section 313 CrPC regarding his apprehension by Delhi Branch of CBI sleuth, on 29.01.2008, seizure of different items on 29.01.2008, and to that extent the burden of prosecution is found lighten to some extent. According to prosecution, it happens to be the post trap event and so, intermediary event is to be properly scrutinized whether the story of acceptance of tainted money, holding of trap as well as apprehension of appellant along with tainted money. In the present circumstances, first of all, one has to see whether Rs. 50,000/- was available with the complainant H.N. Singh and to substantiate the same, it is evident that



from the evidence of PW-26 who had exhibited the statement of Bank Account of Complainant H.N. Singh (Ext-42) coupled with consistent evidence, pretrap exercise. The withdrawal is found duly substantiated. So he was in possession of Rs. 50,000/-. Furthermore, the aforesaid amount was handed over by the aforesaid H.N. Singh to Mann (PW 26) during course of pre trap exercise in presence of other members of the trap team including two independent witnesses. Serial number of the currency were noted down which was subsequently recovered, and for the present, happens to be an exhibit. PW-11 and 12, Kalpesh and Vishwajit, those witnesses including PW-9, PW-24 and PW-26 have shown presence of H.N. Singh at Mayur Hotel where they were staying for the time being and during course thereof, H.N. Singh had tendered written complaint against the appellant. That happens to be the reason behind that PW-24, Superintendent of Police, CBI of Delhi Branch was not at all cross-examined vigorously at the end of appellant over complaint having made by H.N. Singh to him and in likewise manner, having their presence at Patna although tried to challenge the witness which has got no relevancy on account of admission of appellant having been apprehended by the prosecuting team on 29.01.2008 itself.

56. It is evident from the evidence of respective witnesses that means to say, PWs- 11, 12, 19 and 26 over coming to Prabeen at



Marwari Awas over scooter. PW-11 who cited as shadow witness stated regarding conversation with H.N. Singh, directing H.N. Singh to keep the money in a plastic bag which the appellant had handed over to H.N. Singh who accordingly, after getting proper instruction from PW-26, Mann obeyed and kept the same in basket of the scooter, subsequent apprehension along with money from plastic bag taken out from the basket of the scooter though would have been viewed with suspicious eye but, the presence of appellant over search-cum-seizure memo (Ext-38, 38/1) and further non cross-examination by the appellant on that very score to these witnesses is another circumstance which goes against the appellant. At the same time, as indicated above, appellant was personally searched and a currency note of denomination of 500/- as well as official mobile was seized from his personal possession and for that, seizure memo was prepared (Ext-39) containing his signature is an additional circumstance coupled with the fact that apprehension of appellant is found duly admitted at his end and so, the genuineness of the aforesaid exhibits could not be doubted. It is apparent that during cross-examination of PW-26, he has not been cross-examined over conversation having in between H.N. Singh and he himself before putting tainted money in plastic bag, handed over by the appellant, nor any of the witness has been suggested that appellant was not apprehended at Marwari Awas,



search and seizure were not prepared at Marwari Awas. Search was not made at his residence as well as at his office.

57. *In Swarn Singh v. State of Punjab* as reported in (2003)1 SCC 240, it has been held:-

“It is a rule of essential justice that whenever the opponent has declined to avail himself at the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted.”

58. During course of submission, it has been submitted on behalf of appellant that accused was apprehended at 1800 hours while his arrest has been shown lately and prosecution has got no explanation with regard to intervening period which should be considered as fatal to the prosecution because of the fact that this delay has deliberately been at the end of the prosecution in order to prepare fake, forged and fabricated documents to justify apprehension of the appellant which they did intentionally, malafidely, with ulterior motive at the instance of others, against whom, the appellant had given adverse report while he was in Delhi, is found worthless as, the activity of the prosecution party is found duly exposed whereunder they made simultaneous raid bifurcating in two groups, one at the house of the appellant, other in the office along with the appellant wherefrom copy of complaint was seized under seizure list. Appellant had also not denied his presence at the office nor had controverted his



signature over the seizure list (Ext-40).

59. Presence of independent trap witness, PWs-11, 12 is found duly acknowledgeable in same sequence. It is also found that they being Class-III employee, have had their presence on being allowed which materialized on a request by the PW-26 (Mann). Their evidences have not been found intermingled with influence, callousness, perversity. Side by side, appellant also failed to challenge veracity of their evidence on any score, nor PW-26 has been suggested with regard to status of PWs-11 and 12 to be their stamp witness. That being so, there happens to be no occasion to disbelieve the evidence of PWs-11 and 12 which if taken together with the post trap activities, in presence of appellant on all the relevant documents (search and seizure) at the end of appellant over his apprehension by the Delhi Team complete the chain, which, in absence of H.N. Singh as well as I.O. could not be found arenaceous.

60. The learned counsel for the appellant also submitted that the whole prosecution case is found based upon house of cards as there happens to be no seizure of scooter nor during course of investigation as well as trial, its registration number has been disclosed, nay it has been at the end of the prosecution that the scooter stood in the name of appellant. When there happens to be no scooter then, in that event, the story of plastic bag containing tainted amount



kept in the basket of scooter by H.N. Singh goes out of consideration and in likewise manner, the story of recovery. From the bank statement as indicated above (Ext-42) withdrawal of money is there, the tainted money has been seized and happens to be material exhibit and with regard thereto, apart from post trap memorandum seizure list happens to be (Ext-38, 38/1) bearing signatures of the appellant and as the aforesaid Ext-38, 38/1 have not been put under challenge at the end of appellant, on account thereof, seizure/non seizure of scooter goes out of consideration apart from the fact that for the lapses of the I.O. the case of the prosecution would not be allowed to annihilate as has been held by the Hon'ble Apex Court in *Ajay Kumar Singh v. Flag Officer Commander-in-Chief* as reported in (2016) 9 SCC 179

“20. The Contention of respondents is that evidence of PW-15-Fingerprint Expert incriminates the appellants AK Singh and UK Singh. However, in proving this incriminating evidence, there seems to be lapses on the part of the prosecution. As noticed earlier, police constable Tirumal Kumar-photographer of MFSL Unit had taken the photographs of the preserved chance fingerprints. To prove the chance fingerprints lifted from the entrance glass doors of the bank, the prosecution should have proved the photographs by examining constable-Trimul Kumar and should have produced the negatives of the photographs of the chance fingerprints. This lapse in the prosecution, in our view, cannot result in acquittal of the appellants. The evidence adduced by the prosecution must be scrutinized independently of such lapses either in the investigation or by the prosecution or otherwise, the result of the criminal trial would depend upon the level of investigation or the conduct of the prosecution. Criminal trials should not be made casualty for such lapses in the investigation or prosecution.



61. The prosecution had tried to explain the same by way of examining PW-20 and 21 who are CBI sepoy posted at CBI, Patna Branch who came to say that appellant had a scooter and he used to visit office on that scooter. Be that as it may, in the facts and circumstances of the case, it has got no direct bearing upon the prosecution case.

62. It has been pleaded, not shown specifically how the appellant became prejudiced on account of non examination of I.O., whose absence was not intentional rather natural due to his death. Aforesaid eventuality has been perceived by the Hon'ble Apex Court in the case of *Narayana v. State of Karnataka* as reported in **2011 AIR SCW 278**, wherein it has been held :-

“11. Mr. Bhat has, however, submitted that as CW-16, the Investigating Officer had not been examined, this fact caused prejudice to the appellant. This argument has absolutely no merit as CW-16 had died before his statement could be recorded.”

63. Now coming over jurisdictional avenue, it is evident from CBI (Crime) Manual- 2005, Chapter-7 Rule 7.1 identifying the empowerment of Central Unit and for better appreciation, the same is quoted below:-

“Chapter 7 Rule 7.1. The major field work of CBI is done by its Branches/Units, which are headed by the Sr.SP/SP. These branches are located all over India with



their respective territorial jurisdictions. Whereas the Central Units, having functional specialization and created for intensive investigation of the important cases are located at New Delhi and have all India Jurisdiction.”

64. With regard to duty of the Sr.SP/SP relating to Central Unit Chapter 7 Rule 9.6 has to be taken into consideration and for better appreciation the same is quoted below:-

“Chapter 7 Rule 9.6. The Sr.SP/SP-I will supervise all administrative matters and the investigation of all important cases of the Branch. He may, however, distribute some workload to the SP-II with a view to ensure close supervision of the entire working of the Branch, like supervision of investigation/enquiries of some RCs and PEs, maintenance of Crime Digest of cases, verification of source informations and complaints, personally enquiring into some cases, inspection of Malkhana, drawal and disbursal of pay and allowances, checking of Cash Book and connected registers, routine correspondence and administrative work, as may be considered necessary by him.”

65. During course of submissions it has also been submitted that from perusal of the written report, it is evident that H.N. Singh had incorporated the fact while addressing the complaint to PW-24, Saurabh Tiwari, Superintendent of Police, that as per his direction, he is furnishing written complaint and so, illegal activity of prosecution is found exposed. It is found out of consideration in the background of the fact that while cross-examining the aforesaid PW-24, though he was not maker of the document rather he was addressee



and so, as well as document was prepared in his presence, his conduct was to be tested on that very score at least by way of suggestion that he had procured presence of H.N. Singh with an ulterior motive to malign the appellant. Moreover, the aforesaid complaint was scribed in his presence and so, it was incumbent upon the appellant to have duly cross-examined him. Apart from this, from scrutiny of the evidence of PW-24, it is evident that H.N. Singh had already talked with him twice while he was at Delhi Office and so, written complaint was to be filed and for that, even in worst case, perhaps H.N. Singh was instructed in the background of previous talk.

66. At last, legal acumen of the appellant is to be also perceived who, apart from being a CBI personnel happens to be so much conversant with the niceties of the law that during course of trial, he himself defended personally and in the aforesaid background, his evasive answer during course of statement recorded under Section 313 CrPC would also play an important role as has been held by the Hon'ble Apex Court in *Nagraj v. State represented by Inspector of Police, Salem Town, Tamil Nadu* reported in (2015) 4 SCC 739 :-

" 15. In the context of this aspect of the law it is been held by this Court in *Parsuram Pandey vs. State of Bihar* (2004) 13 SCC 189 that Section 313 CrPC is imperative to enable an accused to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused, its corollary being to benefit the Court in reaching its final conclusion; its intention is not to nail the accused, but to comply with the most



salutary and fundamental principle of natural justice i.e. audi alteram partem, as explained in *Arsaf Ali vs. State of Assam* (2008) 16 SCC 328. In *Sher Singh vs. State of Haryana* (2015) 1 SCR 29 this Court has recently clarified that because of the language employed in Section 304B of the IPC, which deals with dowry death, the burden of proving innocence shifts to the accused which is in stark contrast and dissonance to a person's right not to incriminate himself. It is only in the backdrop of Section 304B that an accused must furnish credible evidence which is indicative of his innocence, either under Section 313 CrPC or by examining himself in the witness box or through defence witnesses, as he may be best advised. Having made this clarification, refusal to answer any question put to the accused by the Court in relation to any evidence that may have been presented against him by the prosecution or the accused giving an evasive or unsatisfactory answer, would not justify the Court to return a finding of guilt on this score. Even if it is assumed that his statements do not inspire acceptance, it must not be lost sight of that the burden is cast on the prosecution to prove its case beyond reasonable doubt. Once this burden is met, the Statements under Section 313 assume significance to the extent that the accused may cast some incredulity on the prosecution version. It is not the other way around; in our legal system the accused is not required to establish his innocence. We say this because we are unable to subscribe to the conclusion of the High Court that the substance of his examination under Section 313 was indicative of his guilt. If no explanation is forthcoming, or is unsatisfactory in quality, the effect will be that the conclusion that may reasonably be arrived at would not be dislodged, and would, therefore, subject to the quality of the defence evidence, seal his guilt. Article 20(3) of the Constitution declares that no person accused of any offence shall be compelled to be a witness against himself. In the case in hand, the High Court was not correct in drawing an adverse inference against the Accused because of what he has stated or what he has failed to state in his examination under Section 313 CrPC.”

67. In *L. Laxmikanta v. State by Superintendent of Police*,



Lokayukta reported in **2015 (4) SCC 222**, it has been observed at para-17 as follows:-

68. It is a settled principle in law laid down by this Court in a number of decisions that once the demand and voluntary acceptance of illegal gratification knowing it to be the bribe are proved by evidence then conviction must follow under Section 7 *ibid* against the accused. Indeed, these twin requirements are *sine qua non* for proving the offence under Section 7 of the Act. (See- C.M. Sharma vs. State of Andhra Pradesh [(2010) 15 SCC 1]”.

69. Consequent thereupon, the instant appeal lacks merit and is accordingly, dismissed.

70. Appellant is on bail, his bail bond is cancelled with a direction to surrender before the learned lower court to serve the remaining part of sentence.

(Aditya Kumar Trivedi, J)

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