IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.663 of 2013

Arising Out of PS.Case No. -2 Year- 2010 Thana -C.B.I CASE District- PATNA

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Sunil, Son of Sri Ram Keshwar Prasad Singh Resident Of Yogipur Road, Hilsa, P.S. - Hilsa, District - Nalanda.

.... Appellant

Versus

The State of Bihar through C.B.I. Patna .... Respondent

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Appearance :

For the Appellant/s : Mr. D.K. Sinha, Sr. Advocate

Mr. Abhinay Raj, Advocate

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

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 21-06-2018

Heard Mr. D.K. Sinha, learned Senior Advocate for the appellant and Mr. Bipin Kumar Sinha, learned Standing Counsel for the Central Bureau of Investigation (for short 'CBI').

2. This appeal under Section 374 (2) of the Code of Criminal Procedure (for short 'Cr.P.C.') has been filed by the appellant challenging the judgment of conviction and order of sentence dated 02.09.2013 passed by the learned Special Judge, CBI Court-II, Patna in connection with R.C. Case No.2 of 2010 corresponding to Special Case No.1 of 2010 whereby and whereunder he has convicted the appellant for the offences

punishable under Sections 7 and 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988 (for short 'PC Act') and sentenced him to undergo rigorous imprisonment for one year and to pay a fine of Rs. 2,000/- and in default of payment of fine to undergo simple imprisonment for one month under Section 7 of the PC Act and rigorous imprisonment for two years and to pay a fine of Rs.10,000/- and in default of payment of fine to undergo simple imprisonment for two months for the offence punishable under Section 13(2) read with 13(1)(d) of the PC Act.

3. The first information report (for short 'FIR') vide R.C. Case No.023201040002 dated 09.02.2010 was registered by Sri J.P. Mishra, Additional Superintendent of Police, CBI, Patna on the basis of a complaint dated 06.02.2010 submitted by the complainant Smt. Maya Kumari wife of Sri Arvind Kumar, an agent of Mahila Pradhan Kshetriya Bachat Yojna (MPKBY) in sub-post office, Ekangarsarai, District-Nalanda. She had alleged that the appellant, a cash clerk, sub-post office, Ekangarsarai, Nalanda in agreement with Kameshwar Prasad Singh, Postmaster, Ekangarsarai deducts 10 percent as commission in addition to mandatory deduction of income tax and cess at the time of payment of her commission for deposits made by investors through her under Recurring Deposit (for short 'RD') scheme. She further alleged that her commission for

deposits made under RD scheme for the month of December, 2009 and January, 2010 came to Rs.15398/- and Rs.15,062/- respectively totaling Rs.30,460/- out of which 10 percent income tax deduction came to Rs.3,046/- and 3 percent cess deduction came to Rs.91/-. Therefore, out of the total commission amount of Rs. 30,460/-, Rs. 3,137/- is to be deducted as income tax and cess and she is entitled to receive Rs. 27,323/- as legal commission after all such deductions. She alleged that she would be paid Rs. 24,277/- only instead of Rs.27,323/- and Rs.3,046/- would be illegally deducted as 10 percent commission.

4. On receipt of the complaint, the allegation was verified and after finding truthfulness in the allegation, the FIR was registered on 09.02.2017 against the appellant. After instituting the FIR, a trap team was constituted and a preliminary memorandum in presence of two independent witnesses, namely, Md. Aslam and Sujeet Kumar, both office assistants, Regional Passport Office, Patna was prepared near Madhya Vidyalaya, Ekangarsarai on 10.02.2010 at about 11:45 am and the trap team along with the independent witnesses reached near the sub-post office at 01.45 pm. The complainant and the witness Md. Aslam were directed to proceed to the sub-post office. Rest of the members of the trap team along with other witnesses took suitable position in the sub-post

office in scattered manner from where they could see and watch the conversation. The complainant and Md. Aslam proceeded to the savings counter where the appellant was seated. When the complainant Maya Kumari approached the appellant, he made payment of her commission, which was received by her and thereafter she immediately handed over the money to witness Md. Aslam, who counted the same in presence of the complainant and found it to be Rs.24,277/- instead of Rs. 27,323/-. It is alleged that when complainant enquired from the appellant about the lesser payment of commission, he replied that the remaining amount of money has been deducted as commission. It is alleged that the entire transaction was witnessed by Md. Aslam and Sujeet Kumar besides the complainant. Immediately, Ashok Kumar Jha, Inspector along with other members of the trap team rushed inside the counter and after disclosing their identity, they arrested the appellant on the charge of deducting/accepting Rs.3046/- as illegal gratification. Thereafter, a post-trap memorandum was prepared at about 02:15 pm on 10.02.2010 and a copy of FIR along with pre-trap and post-trap memorandum was transmitted to the court of Special Judge, CBI, South Bihar, Patna on 11.02.2010.

5. On completion of investigation, the investigating officer submitted his report under Section 173 of the Cr.P.C. holding

the prosecution case to be true under Sections 7 and 13 (2) read with 13(1)(d) of the PC Act against the appellant vide charge-sheet no.13 dated 29.06.2010 stating therein that the investigation established that appellant illegally demanded Rs.3046/- from complainant Smt. Maya Kumari out of her Recurring Deposit commission of Rs.30,460/- for the month of December, 2009 and January, 2010 and also illegally deducted the same and thereby committed criminal misconduct by obtaining illegal pecuniary advantage of Rs. 3046/- for himself from the complainant on 10.02.2010.

6. On perusal of the police report submitted under Section 173 of the Cr.P.C., the trial court took cognizance of the offences under which the appellant was sent up for trial and directed him to be physically present for framing of charges.

7. On 21.11.2011, the trial Judge explained charges under two heads to the appellant, namely Sections 13(2) read with 13(1)(d) and 7 of the PC Act, which were denied by him and, thus, after framing of charge the trial commenced.

8. In order to bring home the guilt, altogether 9 witnesses were examined on behalf of the prosecution in course of trial. They are PW-1, Shivnandan Yadav, Superintendent of Post Office Nalanda Division, Biharsharif, PW-2, Rajesh Kumar Singh,

sub-inspector, CBI, PW 3, Ras Bihari Ram, postal Inspector, West Nalanda sub division, PW-4, Kameshwar Prasad Singh, sub post master, sub post office, Ekangarsarai, PW-5, Md. Aslam, office assistant, Regional Passport Office, Patna, PW-6, Sujit Kumar, office assistant, Regional Passport Office, Patna, PW-7, Smt. Maya Kumari, complainant, PW-8, Ashok Kumar Jha, inspector, CBI, Patna and PW-9, Nitesh Kumar, inspector, CBI, Patna .

9. Apart from the ocular testimony of the witnesses, the prosecution has also proved certain documents in support of the charges.

10. On behalf of the defence also, five witnesses namely, DW-1, Sashi Bhusan Prasad, DW-2, Vinay Kumar Singh, DW-3, Kumar Gautam, DW-4, Upendra Kumar and DW-5, Sunil Kumar (appellant) were examined during trial and certain documents were also proved.

11. Assailing the impugned judgment of conviction and order of sentence, Mr. D.K. Sinha, learned Senior Advocate appearing for the appellant submitted that the conviction of the appellant by the trial court is bad in law as also on facts in view of the fact that witnesses have made contradictory statements during the trial. PW-4, Kameshwar Prasad Singh has given clean chit to the

appellant by deposing before the court that the entire commission due to the complainant against the MPKBY scheme was paid to her even before the institution of the complaint. No request was made by the prosecution to declare him hostile and, thus, his deposition would be binding on the prosecution. He submitted that the case of the defence is based on mere *ipse dixit* of the investigation agency and no concrete proof was brought before the court to show that the appellant had ever demanded any illegal gratification or deducted any amount of money from the commission payable to the complainant Maya Kumari for selling financial product of the post office under the Recurring Deposit scheme rather the defence has fully proved the case that the entire commission earned by the complainant and payable to her on RD scheme was paid to her and, thus, trial court ought to have acquitted the appellant instead of convicting him. He submitted that PW-2 who submitted verification report is a wholly unreliable witness as he has admitted in cross-examination that he had not noted in his report the time when he went to Ekangarsarai and when he reached the sub-post office and has also expressed ignorance about the boundary of the sub-post office. He submitted that he has admitted that there is also no mention in the report that he posed as a customer in the sub-post office. Even PW-5 and 6, the so called independent witnesses cannot be called independent witnesses as they accompanied the trap team from Patna and came back together with them. They were working under the influence of the raiding party and thus, they cannot be said to be independent. Moreover, PW-6 has admitted that he had put his signature on several papers in the CBI office, which makes the pre and post trap memorandum doubtful. Referring to the deposition of the complainant, he submitted that the FIR is an ante dated document.

12. *Per contra,* Mr. Bipin Kumar Sinha, learned standing counsel for the CBI submitted that in a fair and impartial investigation conducted by the CBI, the allegations made by complainant against the appellant were found true. In course of trial, witnesses examined on behalf of the prosecution proved the charges beyond reasonable doubts. The complainant has fully supported her case during trial. Also, other witnesses examined on behalf of the prosecution have withstood the test of the cross-examination. Thus, the trial court has rightly convicted and sentenced the appellant for the offences under which charges were framed. He submitted that merely because PW-4 did not support the prosecution case and the prosecutor failed to make request to the court to declare him hostile, the entire prosecution case cannot be disbelieved. According to him, for the negligence of the lawyer conducting the trial, the prosecution

should not suffer. He submitted that the impugned judgment does not suffer from any illegality. Hence, no interference is warranted.

13. I have considered the rival submissions made on behalf of the parties and also perused the oral and documentary evidences as well as the original records.

14. The most important witness in this case is Smt. Maya Kumari, who had filed her complaint before the CBI pursuant to which, the FIR was instituted and investigation was taken up. She stated in her examination-in-chief that she worked in the Ekangarsarai post office as agent since 2002. She came to the CBI office, Patna on 06.02.2010 and submitted her complaint to the Superintendent of Police, CBI, regarding deduction being made from the payment of commission by the clerk of the post office, namely, Sunil Kumar. She stated that this complaint was drafted by her husband Arbind Kumar on which she put her signature. She identified her signature on the complaint which was marked as exhibit-11. She supported the allegations made in the complaint. She stated that on 09.02.2010, she met with PW-2, Rajesh Kumar in Ekangarsarai post-office and was called in Middle School, Ekangarsarai on 10.02.2010. On 10.02.2010, she went to Middle School, Ekangarsarai where she met with P.W.8 Ashok Kumar Jha,

PW-2 Rajesh Kumar, PW-5 Md. Aslam and PW-6 Sujit Kumar and 2-3 other unknown persons. She identified her signature on pre-trap and post-trap memorandum, which were marked as exhibits.

15. In cross-examination, she stated that she cannot say about the date on which deductions were made by the accused Sunil Kumar from her payable commission prior to 06.02.2010. She admitted that in this regard she had never made any complain to any senior officer of the post office. She denied the defence suggestion that since no deduction was made on any previous occasion by accused Sunil Kumar from her payable commission, no complaint was ever made by her to any senior officers of the post office. She admitted that she had lodged complain against Kameshwar Prasad and Sunil Kumar, but she expressed her ignorance of knowledge as to whether any case was registered against Kameshwar Prasad on her complain. She stated that the CBI had conducted her personal search and cautioned her not to take anything with herself. She admitted that when she reached to Ekangarsarai post office, her husband was already present there from before. She stated that she cannot say as to whether the seizure memo contains her signature or not. She stated that CBI officials had verified the cash amount of money at the cash counter of the accused Sunil Kumar. She also admitted that she had put her signature on the payment receipt as

contained in exhibit-5, which would show that Rs.15,398/- was paid to her as commission. Similarly, she had also put her signature on exhibit-6 which would show that Rs.15,067/- was paid to her as commission. She stated that signatures were obtained prior to handing over the amount of commission. She stated that it is wrong to allege that she received the total payable amount of commission and, thereafter, put her signature on the payment receipts. She also denied the defence suggestion that the motive for false implication of the accused is that about a month prior to the alleged date of occurrence, she wanted to take payment of Kishan Vikash Patra without verification, which was objected by the accused Sunil Kumar and the sub-postmaster Kameshwar Prasad for which she had abused them and had also threatened them to implicate in false case. She also admitted that the amount of money kept in the desk of the cash counter of the accused Sunil Kumar was also searched by the trap team.

16. PW-1, Sheo Nandan Yadav stated in his examination-in-chief that on 23.06.2010 he was posted as superintendent of post office, Nalanda, Biharsharif and had issued sanction order for prosecuting the accused Sunil Kumar. He has proved sanction order which has been marked as exhibit-1. In cross-examination, he admitted that on 10.02.2010, in the evening, a

verification of account of the Ekangarsarai post office was made in which no discrepancy was found. He admitted that from perusal of the inquiry report submitted by the inspector, it would appear that the concerned agent was paid the payable amount of commission and on comparison, neither any excess nor any shortage was found in the account. He stated that he cannot say the provision of law under which sanction was granted against the accused for prosecution.

17. PW-2, Rajesh Kumar Singh, a sub-inspector of CBI, stated in his deposition that as per direction of Superintendent of Police, CBI, Patna, he had gone to Ekangarsarai sub-post office on 09.02.2010 for the purpose of verification of complaint made by Maya Devi. On verification, he found the allegations made in the complaint to be true and submitted his verification report. He has identified his writing and signature on the verification report, which was marked as exhibit-2.

18. In cross-examination, he admitted that it has not been mentioned in the report as to when he visited the Ekangarsarai sub-post office and when he reached there. He also admitted that it is not mentioned in the verification report that the complainant accompanied him at the time of verification. He stated that he does

not remember as to whether he had submitted his tour programme and taken the travelling allowance for going to Ekangarsarai. He stated that he cannot say about the boundary of Ekangarsarai sub-post office. He also admitted that there is no mention in the verification report that he posed as a customer in the sub-post office at the time of conducting the verification. He denied the defence suggestion that neither any demand was ever made from the complainant nor he ever visited Ekangarsarai sub-post office and he submitted a fabricated table report even without verifying the allegations.

19. PW-3, Rash Bihari Ram, an Assistant Superintendent of post office, stated in his examination-in-chief that on 14.05.2010, he was working as inspector at Hilsa post office. On 13.05.2010, he received an instruction from the Postal Superintendent, Nalanda, Biharsharif to deliver a circular of MPKBY scheme to the CBI office. He reached at Biharsharif on 13.05.2010 and took certified copy of the circular. He delivered the copy of the circular to CBI inspector Nitesh Kumar on 14.05.2010. He stated that as per the circular under MPKBY scheme, the Central Government wanted to promote small savings through post office. Under the said scheme, only ladies could have been member. He identified the photocopy of the circular, which was attested by the

Superintendent of post office (PW-1), which was marked as exhibit-3.

20. In cross-examination, he admitted that with regard to allegation made in the case, he had made inquiry on 16.02.2010 and found no discrepancy in account transacted by the appellant. He proved his inquiry report dated 16.02.2010, which was marked as exhibit-A. According to him, in course of inquiry, no excess or shortage of account was found in the transaction made by the accused Sunil Kumar in the sub-post office on 10.02.2010. He admitted that no complaint was ever made before him or before any senior officer regarding conduct of the accused Sunil Kumar. He also admitted that as per his knowledge, the accused Sunil Kumar bears a good moral character.

21. PW-4, Kamehwar Prasad was posted as sub-postmaster at Ekangarsarai sub-post office on 10.02.2010. In his deposition, he stated that on 10.02.2010, the CBI officers took certain documents from him regarding which a seizure memo was prepared by the inspector of the CBI, namely, Ashok Kumar Jha. He had also put his signature over the seizure memo. He identified the seizure memo, which was marked as exhibit-4. He also identified the bills of recurring deposit commission of the complainant Maya

Kumari submitted for the period December, 2009 and January, 2010 regarding which, seizure memo was prepared which were marked as exhibit 4-4/44 and exhibit 5-5/43 respectively with objection. He stated that the accused Sunil Kumar was a postal assistant at Ekangasarai sub- post office and he had forwarded the bills of the complainant.

22. In cross-examination, PW-4 stated that the total bill of the complainant was for an amount of Rs.30,460/- and after deducting income tax and surcharge, she was to be paid Rs.27,323/-. He admitted that the excess amount of Rs.3,046/- was not found from the possession of the accused Sunil Kumar. He also admitted that no excess or shortage in the account was found on 10.02.2010. He further admitted that the complainant was paid all her admissible payment of commission. He admitted that Sunil Kumar had never demanded any amount of money from the complainant. He also admitted that the complainant Maya Kumari had falsely implicated him in the case on account of the fact that her husband Arbind Kumar, who is a crooked man, had made the post office his stomping ground and he wanted that the complainant alone should work as an agent in the sub-post office. He stated that about a month prior to the date of occurrence, he had quarreled with the accused Sunil Kumar on the issue of payment of old age pension and when

he intervened, he also quarreled with him. He stated that regarding the said occurrence, he had made a written complaint in the police station.

23. It would be relevant to note her that neither PW-3 nor 4 was declared hostile during trial.

24. As already pointed out, two independent witnesses, namely, Md. Aslam (PW-5) and Sujit Kumar (PW-6), who at the relevant time were office assistants in the Regional Passport Office, Patna had accompanied the trap team and were present throughout the process of trap.

25. PW-5, Md. Aslam stated in his examination-in-chief that on 10.02.2010 he had gone to the CBI office along with his colleague Sujit Kumar on the direction of the officers of the passport office. They reached in the CBI office at 7:00 a.m. where Mr. Ashok Kumar Jha, CBI inspector met him. They were told to accompany the CBI team. They proceeded on a jeep and reached near a school at Ekangarsarai along with the CBI team where the complainant Maya Kumari met them, who disclosed her identity as an agent in the post office. She produced a document and stated that she is entitled to receive an amount of Rs.30,700/- as her commission. The document was in two pages on which he along

with Sujit Kumar put signature. He proved the said document which was marked as exhibit 7-7/3. He stated that the complainant Maya Kumari told them that the employees of the post office, namely, Kameshwar Jee and Sunil Jee make payment of her commission after deducting 10 percent. He stated that a pre-trap memorandum was prepared in the school in two pages by the CBI inspector, namely, A.K. Jha over which he put his signature, which were marked as exhibit 7/4 and 7/5. He stated that thereafter, they proceeded to Ekangarsarai sub-post office. The CBI inspector, A.K. Jha had directed him to remain present with the complainant Maya Kumari. He had also directed Maya Kumari to take only pass-book along with her. Thereafter, he went together with Maya Kumari in the Ekangarsarai sub-post office where the accused Sunil Kumar was found present at the cash counter. Sunil Kumar asked Maya Kumari to come after an hour as payment had not reached. Again, after an hour, he along with Maya Kumari and members of the CBI team visited the sub-post office. He went together with Maya Kumari at the cash counter. Sunil Kumar paid the amount of money to Maya Kumari. She counted the amount of money and, thereafter, she complained that she had been paid lesser amount of commission whereafter, Sunil Kumar told her that the payment was made after deducting his commission. As directed, he took the amount of money from Maya Kumari and counted the same himself. He found that the total amount of money was Rs.24,000/- and odd whereafter, he signaled pursuant to which, the CBI inspector, A.K. Jha asked from Sunil Kumar as to why lesser amount of commission was paid to Maya Kumari on which the appellant stated that he had paid the lesser amount of commission as directed by Kameshwar Prasad. Thereafter, the CBI inspector prepared a post-trap memorandum over which besides him Sujit Kumar and Maya Kumari put their respective signatures. He identified his own signature on the post-trap memorandum, which was marked as exhibit 8 and 8/1.

26. In cross-examination, PW-5, Md. Aslam admitted that he had not taken any travelling allowance for accompanying the CBI team to Ekangarsarai. He denied the defence suggestion that he had never visited Ekangarasarai. He admitted that at the time of raid, husband of Maya Kumari was also present. He further admitted that neither personal search of Maya Kumari nor of her husband was made by the CBI officials in his presence. He admitted that the amount of commission paid to Maya Kumari was counted by him and after counting, the same was handed over to CBI inspector A.K. Jha. He expressed his ignorance as to whether the amount of money was kept in a sealed packet or not. He also expressed his ignorance about the fact as to whether excess or shortage of amount of money

was found by the CBI or not. He further expressed his ignorance to the fact as to whether signature of the accused was taken on the post-trap memorandum or not or a copy of the same was handed over to him or not. He stated that he cannot say as to whether the case is of demand of illegal gratification or of illegal deduction of payable commission.

27. PW-6, Sujit Kumar Singh has also made identical statement to that of PW-5 Md. Aslam. He stated that PW-5 Md. Aslam took amount of money from the complainant and counted the same, whereafter, it was also counted by the CBI inspector. He stated that certain papers were also seized at the place of occurrence, which were already marked as exhibits 5/1-5/43 and 6/0-6/39. He also identified his signature on those documents, which were already marked as exhibits and identifications made by him were marked as exhibits 10-10/42 and 10/43-10/81 respectively. He also identified his signature on the two pages of post-trap memorandum, which were marked as exhibits 10/82-10/83 respectively.

28. In cross-examination, PW-6, Sujit Kumar stated that he had not taken any travelling allowance for going to Ekangarsarai along with CBI team. He stated that the husband of Maya Kumari was not accompanying her. He admitted that no

personal search of Maya Kumari was made at the Middle School, Ekangarsarai. He also admitted that the CBI team did not consist of any lady constable or lady inspector. He stated that the amount of money was seized by the CBI inspector and PW-5 Md. Aslam and a seizure list was prepared. He admitted that the seizure list was not shown to him in the court. He further stated that the cash counter of the accused was verified. However, on further cross-examination, he admitted that he had neither seen the cash counter of the accused nor any checking of cash counter was made in his presence. He admitted that he is not aware of the contents of the pre-trap and post-trap memorandum. He further admitted that no access or shortage of amount of money was found from the cash counter of the accused. He accepted that he put his signature on certain papers in the CBI office on 11.02.2010.

29. PW-8, Ashok Kumar Jha, Inspector of CBI, Patna, who was leading the trap team has supported the prosecution case as narrated by the complainant. He stated that he had arrested the accused Sunil Kumar. Later, on his instruction, arrest memo was prepared by the inspector Amitabh Ranjan on which he put his signature. The arrest memo was marked as exhibit-13. He also identified his signature on seizure memo relating to bill no. ACG17 amounting to Rs.15,398 and Bill No. ACG17 in respect of

commission amounting to Rs.15,062/-, which was marked as exhibit-14. He also identified his signature on post-trap memorandum, which was marked as exhibit-15.

30. In cross-examination, he stated that he received the FIR on 09.02.2010 in which complaint was made against the accused Sunil Kumar and sub-postmaster Kameshwar Prasad. He admitted that in the FIR Kameshwar Prasad is not named. He clarified that Kameshwar Prasad is not named because the complaint made against him was found false. In the verification report, there is no mention that any demand was made by Kameshwar Prasad. He admitted that the verification report is not part of the first information report and the same was never seen by the court. He denied the defence suggestion that the verification report was forged. He stated that simply because the complainant has not mentioned the date on her complaint, the FIR cannot be said to be antedated. He admitted that there is no written order for laying trap by the Superintendent of Police. He further admitted that no lady constable was present in the trap team. He stated that though husband of Maya Kumari was present at the time of trap, but he was not a party to the trap team. He admitted that the amount of money received by the complainant Maya Kumari was not seized because she had received the payable amount of commission. He also

admitted that he did not seize any amount because no fault was found in the transaction of money. He further admitted that he did not verify the amount at the cash counter and he is not aware as to whether the controlling authority ever made any verification in this regard. He denied the defence suggestion that no deduction was made from payable commission of the complainant Maya Kumari.

31. PW-9, Nitesh Kumar stated in his deposition that in February, 2010, he was posted as inspector, CBI (ACB), Patna. He was entrusted with the investigation of the case on 19.02.2010 by the then Superintendent of Police, Sri Dinesh Kashyap. He took over investigation of the case from PW-8 Ashok Kumar Jha. He recorded the statement of witnesses and, on completion of investigation, finding the allegations to be true submitted charge-sheet against accused under Section 7 and 13(1)(d) read with 13(2) of the PC Act in the court. He also identified the formal FIR, which was marked as exhibit-6.

32. In cross-examination, he stated that prior to taking over investigation by him, statement of the accused Sunil Kumar was already recorded by the previous investigating officer. He stated that he cannot say why date was not given by the complainant in her written complaint. He admitted that in the complaint and verification

report, Kameshwar Prasad, sub postmaster is mentioned as an accused, but in the formal FIR, he is not named as an accused. He, however, clarified that in course of investigation, when he took statement of the verifying officer, he stated that in course of verification no evidence was found against Kameshwar Prasad. Hence, he had recommended for institution of FIR only against accused Sunil Kumar. He also admitted that in pre-trap memorandum, it is mentioned that Kameshwar Prasad has also to be trapped. However, since no demand or acceptance was made by him, his name does not find mention in the post-trap memorandum. He further admitted that he did not make any inquiry from the complainant Maya Kumari in course of investigation regarding previous deduction from the commission payable to her by the accused Sunil Kumar. He admitted that he did not make any investigation in respect of verification of account made by the postal inspector, Rash Bihari Ram.

33. After examination of the aforestated prosecution witnesses, the statement of the accused was recorded under Section 313 of the Cr. P.C. in which he has categorically stated that he had handed over Rs.27,323/- to the complainant Maya Kumari and the allegations made by her were false and fabricated. He has also stated

that the prosecution sanction granted by PW-1 is wholly illegal.

34. As stated above, five witnesses in support of the defence of the accused were also examined in course of trial.

35. DW-1, Shashi Bhushan Prasad, in his examination-in-chief stated that in February 2010, he was working as extra delivery agent in Juniar post office. He used to take 'Dak' everyday from Juniar sub-post office to Ekangarsarai sub-post office. On 09.02.2010 and 10.02.2010, he had visited Ekangarsarai sub-post office. He has stated that the complainant did not visit the sub-post office on 09.02.2010 and on 10.02.2010, in his presence, she had presented her bill and had received her commission amounting to Rs.27,323/-. She had accounted the amount of money received by her and, thereafter, put her signature.

36. In cross-examination, he denied the defence suggestion that he had deposed falsely. He reiterated that whatever he has stated in examination-in-chief, was based on his eye account witnesses.

37. DW-2, Vinay Kumar Singh stated in his deposition that in February, 2010, he was posted in Oriawan sub-post office as an extra delivery agent. He used to take 'Dak' from Oriawan to Ekangarsarai sub- post office daily. On 09.02.2010

and 10.02.2010, he had visited Ekangarsarai sub-post office. He stated that on 09.02.2010, neither the complainant met him nor she was found present in the post office. On 10.02.2010, she had submitted her bill to the accused Sunil Kumar, who paid her Rs.27,300/-. After receiving the commission, she put her signature on receipt of the amount and no recovery of excess amount was made from the accused Sunil Kumar.

38. DW-3, Kumar Gautam, post master of Bisai Bigha Branch post office stated in his deposition that on 09.02.2010 when he visited Ekangarsarai post office, the complainant did not meet him. However, on 10.02.2010, the complainant produced her bill for payment of commission and was paid Rs.27,323/- by the accused Sunil Kumar after deduction of TDS and she put her signature on the receipt after receiving the amount of money. He also stated that neither any shortage nor any excess amount was found from the desk of the cash counter of the accused. He further contended that no recovery of amount of money was made either from the possession of the accused or from the possession of the complainant.

39. DW-4, Upendra Kumar, a postal assistant in the Head Post office, Biharsharif, stated that the account of post office of Ekangarsarai dated 10.02.2010 was remitted to the Head Office

on 15.02.2010 and, on comparison, he found account perfectly in order. He has further stated that neither any discrepancy was found in the account maintained by the accused Sunil Kumar nor any recovery of excess amount was made from personal possession.

40. The appellant himself got examined as DW-5. In his deposition, he has stated that his appointing authority was the Chief Postmaster General, Bihar, Patna and not the Superintendent of post office. He further stated that the complainant Maya Kumari did not visit the sub-post-office on 09.02.2010. On 10.02.2010, she produced a bill of Rs.30,460/- out of which, after deduction of TDS, she was paid Rs.27,323/- and after receiving the amount, she put her signature on the receipt. He has further stated that no recovery of excess amount was made from his possession and even in scrutiny, neither any currency shortage nor excess was found in the account of the post office. He has stated that the motive for his false implication by the complainant was that one month prior to the occurrence, she along with her husband came to the sub-post office and wanted payment of Kishan Vikas Patra without verification, which was refused by him.

41. Having appreciated the evidences led on behalf of the parties before the trial court and perused the record and after

hearing the parties, the trial court convicted the appellant in the manner stated above.

42. The issue to be considered by this court is as to whether or not the trial court has appreciated the evidences adduced in correct perspective and has reached to a correct conclusion.

43. As per the admitted case of the prosecution, out of the total commission amounting to Rs.30,460/- earned by the complainant 10 percent income tax and 3 percent cess were to be deducted prior to payment. Thus, after deduction of income tax and cess, the complainant was entitled to receive Rs.27,323/-. The case of the defence is that the entire legal commission earned by the complainant was paid to her whereas the case of the prosecution is that instead of the payable commission amounting to Rs.27,323/-, the complainant made payment of Rs. 24,277/- only. Under such circumstances, the amount alleged to have been illegally deducted by the accused could have been kept and found, either in the (i) desk of the cash counter of the accused; or (ii) from the person of the accused; or (iii) from the person of the complainant; or (iv) from the person of the PW-5 Md. Aslam.

44. As per the evidence adduced before the court, the appellant was searched and no amount was recovered from his

possession. The desk of the cash counter of the accused was also searched, but no recovery of excess amount was made. However, admittedly, the investigating team neither carried personal search of the complainant, who had received the amount from the accused nor subjected PW-5 Md. Aslam to personal search, who had received the amount from the complainant. Furthermore, it is an admitted case of the complainant that she had put signature over the two receipts exhibits 5 and 6, which would go to suggest that the entire admissible commission earned by the complainant was paid to her by the accused.

45. Under such circumstance, no adverse inference can be drawn against the accused nearly on the basis of ocular testimony of the complainant and some of the witnesses that he deducted 10 percent out of the amount of commission earned by the complainant before the actual payment was made to her.

46. I also find material contradiction in the evidence adduced by the prosecution witnesses. The complainant has stated in her deposition that the amount of commission given by the accused was seized by the CBI whereas the PW-8, the first investigating officer, namely, Mr. A. K. Jha stated in his deposition that no seizure of the commission paid to the complainant by the accused was made

in course of investigation. He has gone to the extent of admitting in cross examination that he did not seize the amount in question because the complainant was paid her amount of money earned as commission and that there was no illegality in the transaction of account.

47. Further, from the deposition of PWs-1, 3 and 4, it would be manifest that the account maintained by the accused on 10.02.2010 was scrutinized and was found in order. Neither any currency shortfall nor any excess was found in the account of the sub-post office in course of scrutiny.

48. I further find that the case of the complainant is that she was asked not to carry anything with her, but while preparing the pre-trap or post-trap memorandum, neither the complainant was searched nor any denomination of note handed over to her has been mentioned nor the cash amount was seized. Admittedly, no lady constable or officer was present in the trap team. Since no excess currency was found in the desk of the cash counter of the accused or from his person, no presumption can be drawn against him. As no personal search of the complainant or P.W. 5 made, the story of deduction of earned amount of commission by the accused becomes doubtful. Moreover, once the

accused denied the charge of deduction of amount from the payable commission and the prosecution admitted that the complainant had put her signature on the receipts of payment of the entire payable amount of commission and no discrepancy was found in the scrutiny of the account, merely because the complainant denies the receipt of full payment of commission earned by her, in the opinion of this Court, in absence of any legal evidence against the accused charges could not have been held to be proved.

49. In this regard, I must reiterate here that PW-1, Sheo Nandan Yadav, who had issued sanction order for prosecution of the accused, has admitted in cross-examination that the account of Ekangarsarai sub-post office was scruitinized on 10.02.2010 in the evening and no discrepancy was found in it. He has also admitted that an Inspector, who had conducted the inspection, had also verified the account maintained by the accused and the same was found in order. Similarly, PW-3, Rash Bihari Ram, assistant superintendent of post-office, who conducted inquiry of the account of sub post office on 16.02.2010 stated in his deposition that he had compared the account of the sub-post office on 16.02.2010 and found no discrepancy in the account including that of the account of 10.02.2010. He categorically stated that from his inquiry report, it would be manifest that in the transaction made on 10.02.2010, no

irregularity was found in maintaining the account of the sub-post office.

50. Further, when I consider deposition of PW-4, I find that he has given a death blow to the case of the prosecution. In his cross-examination, he has asserted that the complainant was paid Rs.27,323/- after deducting income tax and surcharge. He has further stated that no excess amount was found either from the person of the accused or from the desk of the cash counter maintained by him. He went to the extent of saying that the husband of the complainant is a crooked man. He had made the sub-post office his stomping ground and wanted that his wife alone should work as an agent in the said sub-post office. He also highlighted about the motive for false implication of the accused.

51. For the reasons best known to the prosecution, the prosecutor in the trial court failed to seek permission of the court to declare PWs-1, 3 and 4 hostile. Thus, their entire deposition would be binding on the prosecution. No reason has been stated by the trial court as to how evidences of PWs.-1, 3 and 4 have been ignored. Their depositions have gone unchallenged and they did not support the prosecution case rather, they support the defence of the accused. Hence, the accused can rely on them. Once their deposition is

accepted, it would be a travesty of justice to hold the accused guilty of the charges.

52. In **Raja Ram and Ors.** v. **State of Rajasthan and Ors. [(2005) 5 SCC 272]**, the doctor who was examined as a prosecution witness stated in his testimony that the deceased was being told by one *K* that she should implicate the accused or else she might have to face prosecution. The doctor was not declared hostile witness. Under such circumstances, the Supreme Court held that the evidence of PW-8 would be binding on the prosecution. The observations made by the Supreme Court in the said case are as under:-

> "But the testimony of PW-8-Dr. Suhkdev Singh, who is another neighbor, cannot easily be surmounted by the prosecution. He has testified in very clear terms that he saw PW-5 making the deceased believe that unless she puts the blame on the Appellant and his parent she would have to face the consequences like prosecution proceedings. It did not occur to the public prosecutor in the trial court to seek permission of the court to her PW-8 as a hostile witness for reasons only known to him. Now, as it is, the evidence of PW-8 is binding on the prosecution. Absolutely no reason, much

> less any good reason, has been stated by the Division Bench of the High Court as to how PW-8's testimony can be side-lined."

53. In **Mukhtiar Ahmed Ansari** v. **State (NCT of Delhi) [(2005) 5 SCC 258]**, the Supreme Court taking note of Raja Ram's case observed in para 30 and 31 as under:-

> "30. A similar question came up for consideration before this Court in *Raja Ram v. State of Rajasthan (2005) 5 SCC 272*. In that case, the evidence of the doctor who was examined as a prosecution witness showed that the deceased was being told by one *K* that she should implicate the accused or else she might have to face prosecution. The doctor was not declared "hostile". The High Court, however, convicted the accused. This Court held that it was open to the defence to rely on the evidence of the doctor and it was binding on the prosecution.
>
> 31. In the present case, evidence of PW 1 Ved Prakash Goel destroyed the genesis of the prosecution that he had given his *Maruti* car to the police in which the police had gone to Bahai Temple and apprehended the accused. When Goel did not support that case, the accused can rely

on that evidence."

54. The proposition of law stated in **Raja Ram v. State of Rajasthan (supra)** and **Mukhtiar Ahmed Ansari v. State (NCT of Delhi) (supra)** is equally applicable to the instant case.

55. Evidences led by PWs. 1, 3 and 4 completely rule out the allegation made by the complainant regarding any deduction made by the accused from her payable commission earned under MPKBY scheme.

56. Before I conclude, I must record that from the evidence of PW-2, Rajesh Kumar Singh, who had made verification into the complaint of the complainant, it becomes really doubtful as to whether any physical verification was made or not. Though, he asserts that he made verification on 09.02.2010 and visited the sub-post office, he admitted in cross-examination that it is not mentioned in his verification report as to when he visited the Ekangarsarai sub-post office and when he reached there. He also admitted that it is not mentioned in the report that the complainant accompanied him at the time of verification. He even failed to describe the boundary of the sub-post office. He also admitted that it is not mentioned in the verification report that he posed as a customer in the sub-post office. All these facts cast a serious doubt

on the verification report submitted by PW-2.

57. In view of the discussions made hereinabove, I find that the trial court grossly erred in convicting and sentencing the appellant. Since the prosecution miserably failed to prove its case in course of trial, the impugned judgment of conviction and order of sentence passed in Special Case No.1 of 2010 arising out of R.C. Case No.2 of 2010 by the learned Special Judge, CBI Court-II, Patna are set aside and the appellant is acquitted of the charges. The bail bonds shall stand discharged.

58. The appeal is allowed.

(Ashwani Kumar Singh, J.)

Sanjeet/-

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