

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

% Reserved on: 22nd February, 2018
Decided on: 23rd May, 2018

+ **CRL.A. 1177/2016**

MANOJ KUMAR MISHRA

..... Appellant

Represented by: Mr. Dayan Krishnan,
Sr. Advocate with Mr. Hemant
Kumar and Ms. Aakashi
Lodha, Advocates.

versus

CBI

..... Respondent

Represented by: Mr. Narender Mann, Spl. P.P
for CBI and Mr. Manoj Pant,
Advocate.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal, the appellant challenges the impugned judgment dated 5th November, 2016 convicting him for the offences punishable under Section 419 IPC and Section 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988 (in short 'PC Act') and the order on sentence dated 16th November, 2016 directing him to undergo rigorous imprisonment for a period of three years and to pay a fine of ₹50,000/- and in default whereof to undergo rigorous imprisonment for a period of six months for the offence punishable under Section 13(2) read with Section 13(1)(d) of PC Act and rigorous imprisonment for a period of one year and to pay a fine of ₹25,000/- and in default whereof to undergo rigorous imprisonment for a period of three months for the offence punishable under Section 419 IPC.

2. Briefly stated, prosecution case is that on 24th May, 2000, H.S.

Bhardwaj made a complaint to SP, CBI/ACP against S.D. Mishra. He stated that on 10th May, 2000 at around 9:30 P.M. he received a phone call and the caller introduced himself as S.D. Mishra from CBI/ACB Branch, who directed him to contact him along with the documents of purchase of house, car and service record. The caller gave his address as G-7/9, Sector 15, Rohini and phone number as 7884407. Next day, the complainant received another call from S.D. Mishra telling him that there were several complaints against him and he should act according to his instructions or he would lose his job. Complainant was receiving these calls daily however he ignored.

3. On 15th May 2000, complainant received a call in the room of M.K. Sharma, DD (Administration) and in a threatening tone, the caller asked him to come to his house or he would raid his house. On 19th May 2000 again, the caller received another call asking him to meet the caller the next day. Thereafter, the complainant visited the house of the caller on 20th May 2000, where he met S.D.Mishra who gave details of the complaints against the complainant like giving medicines after tearing the wrapper, attestation of mark sheet of his daughter by himself, sale of government medicines, not sending intimation of purchase of TV and many other complaints. Complainant was also informed about the inquiry conducted by the Department on various complaints against him. The caller demanded ₹1 lakhs for closing all the complaints. When the complainant told him that he was not in a position to pay ₹1 Lakh, he agreed for ₹50,000 after bargaining. After agreeing to it, the complainant visited the CBI office and lodged a complaint as he did not want to pay the bribe. He also arranged for trap money of ₹10,000. On 24th May 2000

in the evening, he visited CBI office and produced ₹10,000/- in 20 currency notes of ₹500/- denomination. Two independent witnesses namely Jagbir Singh and M.K.Mehta were also present there. Notes were treated with powder. One KCR device was arranged and mic-cum-transmitter was given to him and recorder was kept in the vehicle. The powder treated GC notes were kept in an envelope and handed over to him with the direction to hand it over to S.D. Mishra only on his specific demand.

4. The next day, at 6:00 A.M., complainant along with the trap team, gathered in the CBI office. After completing all the formalities in CBI office, the trap team came to his house and attached an instrument to his phone and then he made a call to S.D. Mishra, who told him that he has to make the complete payment to his wife. On 29th May 2000, when he telephoned S.D. Mishra to inform the date of appointment and date of promotion, he heard a voice on the phone of a person on the other side who was father of S.D. Mishra, who threatened him. He then arranged ₹50,000 and reported it to CBI office. On 30th May 2000, around 6:00 A.M., he again went to the CBI office and produced ₹50,000/-. Notes were smeared in phenolphthalein powder, pre-trap demonstration was given and he was instructed to use the words '*GIN TO LIJIYE*' at the time of transaction. Around 7:30 A.M., they left the CBI office for Sector 15 Rohini and reached house No.G-7/9. The door was opened by M.K. Mishra (appellant) who pretended himself to be S.D. Mishra. M.K. Mishra introduced him to a person present there who was having breakfast as his father and thereafter, the father left. M.K. Mishra asked him if he had arranged the money to which the complainant replied in affirmative. Then

he signaled him to take out the money. Thereafter, he handed over the money. The complainant told him that it was ₹50,000/- to which M.K. Mishra replied that it was ₹40,000/-. Then, the complainant took out ₹10,000/- from his bag and gave it to him who placed it on the table. Complainant stated that he had forgot to say 'GIN TO LIJIYE'. M.K. Mishra told him that he had to go to office, so the complainant left his house. When the complainant came down, he signaled the trap team which rushed towards the house of M.K. Mishra. The door was opened by M.K. Mishra. Upon being asked whether he had accepted ₹50,000/- as demanded, M.K. Mishra answered in affirmative. The notes lying on the table were bearing the same government currency number. Thereafter, M.K. Mishra was apprehended by Insp. H.S. Karmayal and Ct. Rajesh Kumar. M.K. Mishra stated that he was not S.D. Mishra. S.D. Mishra was his father who was working in CBI, MDMA.

5. Vide order dated 6th August, 2004, the following charge was framed against the appellant:

“Firstly, that on 30.5.2000 at G-7/9, Sector-15, Rohini, Delhi you Manoj Kumar Mishra cheated Dr. H.S. Bhardwaj by impersonating yourself to be S.D. Mishra, Inspector, CBI and representing to him as S.D. Mishra and thereby fraudulently and dishonestly inducing Dr. Hari Shankar Bhardwaj to deliver ₹50,000/- to you which caused damage to Dr. H.S. Bhardwaj and you thereby committed an offence punishable under Sec. 419 IPC and within the cognizance of this Court.

Secondly, that you being public servant while working as Accountant in National Building Construction Corporation Ltd. demanded ₹50,000/- as illegal gratification from Dr. Hari Shankar Bhardwaj, CMO (Ayurveda), Indira Gandhi, ESI Hospital, Jhilmil Colony, Delhi for closing or for not taking any

action on the so called complaint against him and in pursuance of the demand you accepted ₹50,000/- as illegal gratification for above said motive and thereby you committed an offence punishable under Sec.7 of the PC Act and within the cognizance of this court.

Thirdly, that you being public servant while working as Accountant in National Building Construction Corporation Ltd. by abusing your official position or otherwise by corrupt or illegal means obtained pecuniary advantage to the tune of ₹50,000/- for yourself and for your co-accused S.D. Mishra and thereby you committed an offence punishable under Sec. 13(1)(d) r/w 13(2) of PC Act and within the cognizance of this Court.”

6. After recording of evidence learned Special Judge convicted the appellant for offences punishable under Sections 419 IPC and Section 13(1)(d) read with Section 13(2) PC Act, however acquitted the appellant for offence punishable under Section 7 PC Act. Learned Special Judge while acquitting the appellant for the offence punishable under Section 7 of Prevention of Corruption Act, 1988 observed:

“77. In view of the above legal propositions, it is crystal clear that to attract the provisions of Section 7 of the PC Act, it is mandatory that the alleged acts of the accused public servant should be performed or connected with the discharge of his official functions or duties. Though the accused facing trial herein, i.e. A-1 Manoj Kumar Mishra, is also admittedly a public servant being an official of NBCC, but it is the admitted case of prosecution that no work of the complainant pertaining to the office of accused or NBCC was pending with A-1 as the above complaints allegedly filed against the complainant pertained to the office of A-2 or were purportedly pending enquiry in the office of CBI, i.e. the office of A-2 Satya Deo Mishra (since deceased). Hence, in his own capacity as a public servant A-1 was never in a position to do or extend any

favours or disfavours etc to the complainant even after demanding and accepting the above said bribe amount of ₹50,000/- and therefore, charge for the offence defined and made punishable by Section 7 of the PC Act can never be held as proved against the accused as the said Section is not attracted in the present case.”

7. Learned counsel for the appellant contends that the ingredient of abuse of position as a public servant is sine-qua-non to prove an offence punishable under Section 13(1)(d) of the PC Act. Reliance is placed on the decisions reported as (1972) 2 SCC 392 State of Gujarat Vs. Manshankar Prabhashankar Dwivedi and (1995) Suppl.(3) SCC 702 State by Special Police Establishment Vs. D. Krishnamurthy. It is contended that the Hon'ble Supreme Court was conscious of the amendment to the heading of Section 5 of the Prevention of Corruption Act, 1947 (in short the PC Act, 1947) vide Central Act 40 of 1964, while holding that abuse of position as a public servant is a necessary ingredient for offence punishable under Section 5(1)(d) of the PC Act. The appellant has admittedly not acted in his capacity as an employee of NBCC i.e. abuse of position as an employee of NBCC, thus he could not have been convicted for offence punishable under Section 13(1)(d) of the PC Act, 1988. Countering the arguments on behalf of learned counsel for the CBI it is contended that reference to the notes on Clauses to the bill for PC Act, 1988 to suggest that abuse of position as a public servant is no longer a requirement under Section 13(1)(d) of the PC Act, 1988 is misplaced inasmuch as it does not take away from the dicta of the Hon'ble Supreme Court in Manshankar Prabhashankar Dwivedi (supra) stating that the requirements of abuse of position as a public servant is implied under

clauses (a) to (e) of Section 5 of the PC Act, 1947. Further countering the arguments of learned counsel for the CBI relying upon the decision of B. Parameswaran Vs. State (1998) SCC Online AP 761 it is contended that the said decision of the Andhra Pradesh High Court fails to consider the decisions of the Hon'ble Supreme Court in Manshankar Prabhashankar Dwivedi (supra) and D. Krishnamoorthy (supra). In any case even as per the facts in B. Parameswaran (supra) the accused therein was in fact an employee of the Indian Railways and was attempting to use his influence with the Railways. Thus the said decision has no application to the facts of the present case.

8. It is further contended that even otherwise the prosecution has failed to prove the alleged conversations recorded in the cassettes on 24th May, 2000, 25th May, 2000 and 30th May, 2000 for the reason the same do not qualify the test laid down in the decision reported as (1985) Supp. SCC 611 Ram Singh Vs. Col. Ram Singh. The case of the prosecution itself is that the witness M.K. Mehta (PW-3) heard the conversation on 30th May, 2000 through headphones connected to the KCR device. Thus it was essential for the prosecution to prove that the KCR device was not tampered with and exhibit the said device during the course of trial. Having failed in exhibiting and proving the KCR device, statement of M.K. Mehta that he heard the conversation cannot be relied upon. M.K. Mehta was admittedly not an eye-witness to the transaction and had only heard the conversation through the device which admittedly has not been forensically examined. The tapes of conversation are not compliant with the test laid down in Ram Singh (supra). As a matter of fact M.K. Mishra himself questioned the technical soundness of the KCR device. Further

the cassettes of the alleged conversation recorded on 25th May, 2000 and 30th May, 2000 were sent to the market to be copied as per memos Ex.PW-2/G and Ex.PW-2/L. Thus the cassettes were not seized immediately and their sanctity was not maintained. For the witnesses having stated in their deposition that there was noise and disturbance in the recording, cassettes were sent to be copied in the open market, the original cassettes were not sealed immediately but played on the same device which was capable of recording and no forensic analysis of the cassettes, KCR device or Sony micro-cassette recorder having been done, the prosecution has failed to prove the alleged conversation. The complainant/PW-2 in his cross-examination dated 24th May, 2000 was specifically questioned about the alleged conversation recorded on 30th May, 2000 and was suggested that the same was edited and fabricated.

9. Even if this Court accepts the version of the complainant/PW-2 the same cannot be relied in the absence of corroboration as he is an interested and partisan witness. Reliance is placed on (2012) 11 SCC 642 Mukut Bihari Vs. State of Rajasthan. Actual demand if any on the day of trap is only by gesture and the words “*paise ka intezam ho gaya*” is not in the transcript. It is further submitted that offence punishable under Section 419 IPC is also not made out against the appellant as there was no cheating by impersonation. The alleged transcript for the conversation between the complainant/PW-2 and appellant itself shows that the complainant was aware that he was talking to Manoj Kumar Mishra and not his father S.D. Mishra. Even the finding of the Trial Court is that “*it is only in furtherance of the said conspiracy that A-1 had impersonated as A-2*” and had demanded and accepted the above bribe amount from the

complainant”. Appellant having been accused of the charge of conspiracy no case for conviction under Section 419 IPC is made out.

10. Learned counsel for the CBI submits that by the Anti-Corruption Laws (Amendments) Act, 1964 the words “*in discharge of his duties*” were omitted from Section 5(a) in sub-Section (1)(i) and in the clause (d) the word ‘*or*’ was inserted thereby implying that “abuse of the official position” was no more a precursor for conviction under Section 13(1)(d) of the PC Act, 1988. The statement of ‘Objects and Reasons’ of PC Act, 1988 noted that the bill was intended to make the existing anti-corruption laws more effective by widening their ambit and strengthening the provisions. The effect of introduction of the new Act and amendment to Section 5(1)(d) PC Act, 1947 was considered by the Andhra Pradesh High Court in B. Parameswaran (supra) which is the right interpretation and no interpretation contrary to the same can be given. “Abuse of the position” is inbuilt in corrupt or illegal means. Thus, it was not necessary for the prosecution to show that the corrupt or illegal means are in discharge of the official duty. Till the year 1962 unless the public servant did not commit the offence in discharge of his duty he was not liable to be punished under the provisions of PC Act; however with the amendment brought in the year 1962 it was not necessary that the public servant acted in discharge of his official duty. Reliance is placed on the decisions of the Supreme Court in (1959) Supp. (2) SCR 739 State of Ajmer Vs. Shivji Lal and AIR 1962 SC 195 Dhaneshwar Narain Saxena v. Delhi Admn. Reliance of learned counsel for the appellant on Manshankar Prabhashankar Dwivedi (supra) is misconceived for the reason the date of offence in the said case was April, 1964 and based on the legal provision

then prevailing, the Supreme Court interpreted the law. The requirement as contemplated in Section 5(1)(d) of PC Act, 1947 which used a single phrase cannot be imported in Section 13(1)(d) of PC Act, 1988 for the reason the sub-Clause has been split in three parts consciously irrespective of the abuse of position by the accused as a public servant.

11. Contention of learned counsel for the appellant that the cassettes were not seized and sealed immediately deserves to be rejected for the reason Ex.PW-2/D as also the evidence of PW-2, 3, 18, 19 and 20 proves that the cassette dated 24th May, 2000 was immediately seized and sealed. Similarly, memos Ex.PW-2/G and Ex.PW-2/L also show that the second and third cassette respectively were also seized and sealed immediately. The three cassettes were sent to the CFSL and the report received thereon has been duly exhibited. The report of CFSL shows that the seals tallied with the form and were intact. The CFSL in response to the query No.3 also noted clearly audible portions of the voices in cassettes and identified the same to be that of the appellant and his father. The testimony of the complainant cannot be rejected merely because he is interested in the success of the case. Version of the complainant is duly corroborated by independent material and deposition of other witnesses. CFSL also proves the handwash. Hence, the appeal be dismissed.

12. Based on the contentions of learned counsels for the parties following issues need to be decided in the present case:

“i) Whether abuse of position is a precursor for conviction under Section 13(1)(d) of Prevention of Corruption Act even if the case falls under Section 13(1)(d)(i) of Prevention of Corruption Act?

ii) Whether on facts the prosecution has lead admissible evidence to prove that the appellant impersonated himself and derived illegal gratification?”

13. *Issue No. (i): Whether abuse of position is a precursor for conviction under Section 13(1)(d) of Prevention of Corruption Act even if the case falls under Section 13(1)(d)(i) of Prevention of Corruption Act?*

13.1. Learned Senior Counsel for the appellant has placed reliance on the decision of Constitution Bench of Supreme Court reported as AIR 1962 SC 195 Dhaneshwar Narain Saxena v. Delhi Admn. wherein it was held:

“3. Before this Court it has been strenuously argued that on the findings of fact arrived at by the courts below, accepting the prosecution story as told by the main prosecution witness Ram Narain, no offence under Section 5(1)(d) of the Act has been made out. Reliance was placed mainly upon the decision of the Division Bench of this Court in State of Ajmer v. Shivji Lal [(1959) Supp. (2) SCR 739]. That case, if correctly decided, certainly supports the appellant's contention, because it has been laid down in that case that in order to attract the operation of Section 5(1)(d) of the Act it was a necessary element of the crime charged that the public servant should have misconducted himself in the discharge of his own duty, and that if the official favour promised by the public servant to the giver of the money was not in the hands of the public servant, he could not be said to have misconducted himself in the discharge of his own duty. In that case, the accused person was a school teacher and the charge against him was that he had promised to the giver of the money to secure a job for him in the Railway Running Shed at Mount Abu. It was not a part of his duty to make any such appointment and, therefore, when he took the money for procuring a job for the complainant, he could not be convicted for committing misconduct within the meaning of Section 5(2) of the Act. The ratio of the decision is contained in the following paragraph of the judgment in that case:

“The offence under this provision consists of criminal misconduct in the discharge of his duty. In order, therefore, that this offence is committed there should be misconduct by the public servant in the discharge of his duty. In other words the public servant must do something in connection with his own duty and thereby obtain money for himself or for any other person by corrupt or illegal means or by otherwise abusing his position. If a public servant takes money from a third person in order to corrupt some other public servant and there is no question of his misconducting himself in the discharge of his own duty, that action may be an offence under Section 161 of the Indian Penal Code but would not be an offence under Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act. The essence of an offence under Section 5(2) read with Section 5(1)(d) is that the public servant should do something in the discharge of his own duty and thereby obtain any valuable thing or pecuniary advantage for himself or for any other person by corrupt or illegal means or by otherwise abusing his position. The words ‘by otherwise abusing his position’ read along with the words ‘in the discharge of his duty’ appearing in Section 5(1)(d) make it quite clear that an offence under that section requires that the public servant should misconduct himself in the discharge of his own duty. In the present case, the accused was a teacher and it was no part of his duty to make appointments in the Running Shed at Abu Road. There would, therefore, be no question of his committing misconduct in the discharge of his duty when he took money for procuring a job for Prem Singh in the Running Shed. So far, therefore, as the charge under Section 5(1)(d) is concerned, we are of opinion that there was no question of the accused misconducting himself in the discharge of his own duty in the circumstances of this case and it must fail.”

The relevant portion of Section 5 of the Act is in these terms:

“5. Criminal misconduct in discharge of official duty.—

(1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duty—

*(a)-(c) ****

(d) if he, by corrupt or illegal means or by otherwise abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage.

(2) Any public servant who commits criminal misconduct in the discharge of his duty shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both.”

4. It will be observed that the heading of Section 5 is Criminal misconduct in the discharge of official duty. That is a new offence which was created by the Act, apart from and in addition to offences under the Indian Penal Code, like, those under Section 161, etc. The legislature advisedly widened the scope of the crime by giving a very wide definition in Section 5 with a view to punish those who, holding public office and taking advantage of their official position, obtain any valuable thing or pecuniary advantage. The necessary ingredient of an offence under Section 161 of the Indian Penal Code, is the clause “as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Central or any State Government or Parliament or the Legislature of any State, or with any public servant”, but it need not be there in order to bring an offence under Section 5 of the Act home to the accused. The offence under this section is, thus, wider and not narrower, than the offence of bribery as defined in Section 161 of the IPC. The words

“in the discharge of his duty” do not constitute an essential ingredient of the offence. The mistake in the judgment of this Court in the aforesaid ruling in State of Ajmer v. Shivji Lal [(1959) Supp. (2) SCR 739] has arisen from reading those words, which are part merely of the nomenclature of the offence created by the Statute, whose ingredients are set out in sub-clauses (a) to (d) that follow, as descriptive of an essential and additional ingredient of each of the types of offence in the four sub-clauses. That that is the source of the mistake is apparent from the erroneous way in which the section has been quoted at p. 744 of the Supreme Court Report, in the paragraph preceding the paragraph quoted above. The ingredients of the particular offence in clause (d) of Section 5(1) of the Act are; (1) that he should be a public servant; (2) that he should use some corrupt or illegal means or otherwise abuse his position as a public servant; (3) that he should have thereby obtained a valuable thing or pecuniary advantage; and (4) for himself or for any other person. In order to bring the charge home to an accused person under clause (d) aforesaid of the section, it is not necessary, that the public servant in question, while misconducting himself, should have done so in the discharge of his duty. It would be anomalous to say that a public servant has misconducted himself in the discharge of his duty. “Duty” and “misconduct” go ill together. If a person has misconducted himself as a public servant, it would not ordinarily be in the discharge of his duty, but the reverse of it. That “misconduct”, which has been made criminal by Section 5 of the Act, does not contain the element of discharge of his duty, by public servant, is also made clear by reference to the provisions of clause (c) of Section 5(1). It is well settled that if a public servant dishonestly or fraudulently misappropriates property entrusted to him, he cannot be said to have been doing so in the discharge of his official duty (vide the case of Hori Ram Singh v. Crown [(1939) FCR 159] . An application for special leave to appeal from that decision was refused by the Privy Council in Hori Ram Singh v. King-Emperor [(1940) FCR 15] . This

Court, therefore, misread the section when it observed that the offence consists in criminal misconduct in the discharge of official duty. The error lies in importing the description of the offence into the definition portion of it. It is not necessary to constitute the offence under clause (d) of the section that the public servant must do something in connection with his own duty and thereby obtain any valuable thing or pecuniary advantage. It is equally wrong to say that if a public servant were to take money from a third person, by corrupt illegal means or otherwise abusing his official position, in order to corrupt some other public servant, without there being any question of his misconducting himself in the discharge of his own duty, he has not committed an offence under Section 5(1)(d). It is also erroneous to hold that the essence of an offence under Section 5(2), read with Section 5(1)(d), is that the public servant should do something in the discharge of his own duty and thereby obtain a valuable thing or pecuniary advantage.”

13.2. Reliance is also placed by learned Senior Counsel for the appellant on the decision of Supreme Court reported as Manshankar Prabhashankar Dwivedi (supra) wherein it was observed as under:

“12. The next point which calls for decision is whether appellant Dwivedi was guilty of an offence under Section 5(1)(d) of the Corruption Act. That provision, as it stood at the material time, was as follows:

*“5. (1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duty—
(d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage.”*

By the Central Act, 40 of 1964 the words “in the discharge of his duty” were omitted. This court has, however, taken the

view in *Dhaneshwar Narain Saxena v. Delhi Administration* [AIR 1962 SC 195; (1962) 3 SCR 259; (1962) 2 SCJ 538; (1962) 1 Cri LJ 203] overruling an earlier decision that in order to constitute an offence under clause (d) of Section 5(1) of the Corruption Act it is not necessary that the public servant while misconducting himself should have done so in the discharge of his duty. Section 2 of this Act provides that for its purposes “public servant” means a public servant as defined in Section 21 of the Indian Penal Code. Dwivedi while committing the offence under Section 5(1)(d) had two positions; (1) he was a lecturer in a Government College and (2) he was an examiner appointed by the Gujarat University for doing examination work on remuneration paid by the University. As a lecturer in Government College he certainly fell within the definition of “public servant” but the act of corruption attributed to him was in his capacity as examiner. A question at once arises whether Section 5(1)(d) will apply to the case of a Government servant who commits an act punishable under the said provision even though when the act is committed by him he is holding a different position which is not that of a government servant and in which capacity alone he could fall within the definition of a “public servant”. The High Court proceeded on the basis that for the purpose of the opening part of Section 5(1) of the Corruption Act, Dwivedi must be held to be a public servant. It was held that his case did not fall within the (sic) clause (d) as he did not abuse his position as a public servant although the means employed were corrupt and illegal.

13. The argument on behalf of the State is that even if Dwivedi was not punishable under Section 161 of the Indian Penal Code with reference to the work in respect of which he accepted an illegal gratification he would nevertheless be liable under Section 5(1)(d) of the Corruption Act because the liability of a public servant has been made absolute and it is wholly immaterial in what capacity he has committed the offence under sub-clause (d) of Section 5(1) of the Corruption Act. He need not have obtained for himself any valuable thing

or pecuniary advantage as a public servant. Once he is a Government servant and thus falls within the definition of a public servant and if he uses corrupt or illegal means for obtaining a valuable thing or pecuniary advantage he commits an offence as contemplated by Section 5(1)(d). It need not further be proved that he abused his position as a public servant.

14. We may refer to the previous decisions of this Court relating to the interpretation of Section 5(1)(d) of the Corruption Act. In Dhaneshwar Narain Saxena v. Delhi Administration; Saxena, who was an Upper Division Clerk, was approached by one Ram Narain, a fireman serving in the Delhi Fire Brigade, for assistance in obtaining a licence for a double barrelled shot gun which was, in fact obtained. Saxena was paid certain amount and a promise was made to pay him more. Ram Narain had made a false declaration with regard to his salary in the application for the licence. His allegation was that he had done so on the advice of Saxena. As Ram Narain's licence had been cancelled it was alleged that he again approached Saxena who demanded some amounts for helping him in the matter of restoration of the licence. Ultimately a trap was laid and Saxena was caught while the money was being handed over to him. The main argument in this case centered on the question whether Saxena had committed any misconduct in the discharge of his duty. Overruling the earlier decision of this Court in the State of Ajmer v. Shivji Lal [AIR 1959 SC 847: 1959 Supp (2) SCR 739: 1959 SCJ 911: 1959 Cri LJ 1127] it was held that it was not necessary to constitute the offence under clause (d) of Section 5(1) that the public servant must do something in connection with his own duty and thereby obtain any valuable thing or pecuniary advantage. It was observed that "it was equally wrong to say that if a public servant were to take money from a third person by corrupt or illegal means or otherwise abusing his official position in order to corrupt some other public servant without there being any question of his misconducting himself in the discharge of his own duty he

has not committed an offence under Section 5(1)(d). It is also erroneous to hold that the essence of an offence under Section 5(2) read with Section 5(1)(d) is that the public servant should do something in the discharge of his own duty and thereby obtain valuable thing or pecuniary advantage". No such question was argued or decided in that case whether for the commission of an offence under Section 5(1)(d) abuse of position as a public servant was of the essence or the essential ingredient of the offence. It is noteworthy that the High Court had, on the evidence produced by the prosecution, come to the conclusion that Saxena taking advantage of his own position as an employee in the Chief Commissioner's Office and Ram Narain's ignorance and anxiety to get the licence, had induced him to part with the money on the promise that he would get the licence restored. It appears, therefore, that it was in that background that the decision of this Court was given. The case of M. Narayanan Nambiar v. State of Kerala, [AIR 1963 SC 116: 1963 Supp (2) SCR 724: (1963) 2 Cri LJ 186: (1963) 2 SCJ 582] was clearly one in which there had been abuse by a Government servant of his position as a public servant. The court referred to the preamble which indicates that the Corruption Act was passed as it was expedient to make more effective provisions for the prevention of bribery and corruption by public servants. The addition of the word "corruption" showed that the legislation was intended to combat other evils in addition to bribery. The argument on behalf of the accused in that case proceeded on the basis that clause (d) would take in only the case of direct benefit obtained by a public servant for himself or for any other person from a third party in the manner prescribed therein and did not cover the case of wrongful loss caused to the Government by abuse of his power. While analysing Section 5(1)(d), it was said:

"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 acts 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 and if no limitation is placed on it, the words 'corrupt', 'illegal' and 'otherwise' mentioned in the clause become surplusage, for on that construction every abuse of position is gathered by the clause. So some limitation will have to be put on that word and that limitation is that it takes colour from the preceding words along with which it appears in the clause, that is to say something savouring of dishonest act on his part."

The court entertained no doubt that every benefit obtained by the public servant for himself or for any other person by abusing his position as a public servant fell within the mischief of the said clause.

15. Although in the above decision the question whether the words "abusing his position as a public servant" qualify the word "otherwise" or also the words "corrupt or illegal means" in Section 5(1)(d) was not discussed directly, the observations made seem to indicate that the word "otherwise" refers to means other than corrupt or illegal by which a public servant may abuse his position. There are two ways of looking at the clause; one is that the words "corrupt or illegal means" stand by themselves and as soon as it is established that a public servant has by such means obtained any valuable thing or pecuniary advantage he will be guilty of the offence. The other way of reading this clause is by confining the words "by otherwise" to the means employed. Thus the means employed may be corrupt or illegal or may be of such a nature as would savour of a dishonest act. But

the abuse of position as a public servant would be essential whether the means are corrupt or illegal or are of the nature covered by the word "otherwise". The analysis of clause (d) made in Narayanan Nambiar case, by Subba Rao, J., (as he then was) seems to lend support to the view taken by the High Court that the abuse of position as a public servant is essential. The reasoning of the High Court proceeds on these lines. The second part of clause (d) relating to the obtaining of the valuable thing etc. relates to the object of the public servant, namely, the obtaining of a bribe. The first part concerns the manner of achieving that object. "The manner is the use of means and use of position. As to the use of means the clause expressly mentions corrupt or illegal but the Legislature does not want to limit itself to these means only and so goes on to use the word "otherwise". If the meaning to be given to the word "otherwise" is, as earlier stated, the words "by corrupt or illegal means" or "by otherwise" form a single clause and do not form two clauses. If that is so the abuse of position as a public servant that is referred to is "the abuse by corrupt or illegal means or by otherwise". The High Court also relied on the analysis of Section 5(1)(d) contained in Ram Krishna v. State of Delhi [AIR 1956 SC 476 : 1956 SCR 182 : 1956 SCJ 432 : 1956 Cri LJ 837] where it was pointed out that the offence created thereby is of four kinds. Bribery as defined in Section 161 of the Indian Penal Code, if it is habitual, falls within clause (a). Bribery of the kind specified in Section 165, if it is habitual, is comprised in clause (b). Clause (c) contemplates criminal breach of trust by a public servant. For that Section 405 of the Indian Penal Code has to be looked at. An argument was advanced in that case that clause (d) seems to create an independent offence distinct from simple bribery. This is what the court observed:

"In one sense, this is no doubt true but it does not follow that there is no overlapping of offences. We have primarily to look at the language employed and give effect to it. One class of cases might arise when corrupt

or illegal means are adopted or pursued by the public servant to gain for himself a pecuniary advantage. The word 'obtains' on which much stress was laid does not eliminate the idea of acceptance of what is given or offered to be given, though it connotes also an element of effort on the part of the receiver. One may accept money that is offered, or solicit payment of a bribe, or extort the bribe by threat or coercion; in each case, he obtains a pecuniary advantage by abusing his position as a public servant."

16. Thus in clauses (a), (b) and (c) the abuse of position as a public servant is clearly implied. Clause (e) also carries the same implication. It would, therefore, be reasonable to put on clause (d) a construction which is consistent with the other clauses of the sub-section. According to the High Court such a construction would also keep the offence within the limitation and the object of the Act. The abuse of the position would be the necessary ingredient of the offence; the abuse being either by corrupt or illegal means or by other means of the nature mentioned in Narayanan Nambiar case."

13.3. Learned Senior Counsel for the appellant further relies upon the decision of Supreme Court reported as 1995 Supp (3) SCC 702 State v. D. Krishnamurthy wherein it was noted:

"2. We have gone through the impugned judgment and order of the High Court carefully and have also examined the question about the supposed conflict between the two decisions of this Court in State of Gujarat v. Manshankar Prabhashankar Dwivedi [(1972) 2 SCC 392 : 1972 SCC (Cri) 728; (1973) 1 SCR 313] and Dhaneshwar Narain Saxena v. Delhi Admn. [AIR 1962 SC 195; (1962) 1 Cri LJ 203] On reading these two precedents, there seems to us to be no conflict whatsoever. The language of Section 5(1)(d) of the Prevention of Corruption Act, 1947 is clear and unambiguous in the sense that if a public servant by

whatever means, be they corrupt or illegal, obtains for himself or any other person any valuable thing or pecuniary advantage must, in any event, for doing so, abuse his position as a public servant. (emphasis supplied) If such abuse of his position as a public servant, is lacking in the prosecution case, and there is evidence barely to the effect, that he has by some means, be they illegal or corrupt, obtained for himself or any other person any valuable thing or pecuniary advantage, that by itself would not be enough. It thus appears to us that instantly the charge against the respondent was rightly quashed by the High Court. There is no merit in this appeal which is ordered to be dismissed.”

13.4. Section 13(1)(d) of PC Act 1988 which is relevant for the facts of the present case reads as under:

“13. Criminal misconduct by a public servant.-

(1) A public servant is said to commit the offence of criminal misconduct,-

(a)

(b)

(c)

(d) if he,—

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest;”

13.5. This Court in the decision reported as (2014) 1 HCC (Del) 178 *Mahesh Pal Singh Vs. State (NCT of Delhi)* interpreted the words “*corrupt or illegal means*” and held as under:

“19. The expression “corrupt or illegal means” has not been defined in the Act. Illegal would obviously mean something which the law prohibits. The definition of the expression “corrupt” in the Shorter Oxford Dictionary includes something influenced by bribery. This expression would also include something which is morally unsound, dishonest, depraved or pervert. Therefore, accepting money as bribe would certainly amount to use of corrupt means. Since taking or attempting to take bribe is prohibited by law, such an act would also amount to use of illegal means. The appellant, therefore, is guilty of criminal misconduct under Section 13(1)(d)(i) of the Act since he took Rs 3000 from the complainant by corrupt and illegal means.”

13.6. Word ‘corrupt’ has not been defined either in Indian Penal Code or the PC Act. As per the Cambridge dictionary, word ‘corrupt’ means ‘*having or showing a willingness to act dishonestly in return for money or personal gain*’ and as per the Oxford dictionary it means ‘*cause to act dishonestly in return for money or personal gain. To change from good to bad in morals, manners, or actions.*’

13.7. Word ‘illegal’ has been defined under Section 43 IPC as under:-

43. “Illegal”, “Legally bound to do”.—The word “illegal” is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be “legally bound to do” whatever it is illegal in him to omit.

13.8. The amendment as introduced to Section 13 (1)(d) PC Act clearly deletes the words ‘in discharge of his official duties’ which gave a restricted meaning to the provisions of Section 13 (1)(d) of the PC Act. Pursuant to the amendment, it is not necessary that the act committed by the officer should be in discharge of his official duty, however, the fact

remains whether deletion of the words ‘acting in discharge of his official duty’ would also take away from the ambit of Section 13 (1)(d)(i) of PC Act any act which is not an abuse of his position as public servant. As held by Hon’ble Supreme Court in the decision reported as Manshankar Prabhashankar Dwivedi (supra), it would be appropriate to give a construction where abuse of position as a public servant is also a necessary ingredient of clause (d) of Section 13 (1) PC Act as reproduced para in 13.2 above.

13.9. Even in the decision reported as 1999 Cr.L.J 2059 (AP) B. Parmeshwaran vs. State of A.P. relied upon by the learned counsel for the CBI, Andhra Pradesh High Court noted that “abuse of his position as public servant” is central for an offence defined under Section 13 (1) (d) PC Act, 1988 even if it is by “corrupt or illegal means”. In the said case High Court noted that the complainant believed the accused as he was an employee of South Central Railways. Thus there was an element of abuse of his position as public servant. Dealing with the PC Act 1988, High Court held as under:

12. Further, there appears to be a substantial change in the comparable provisions under the Prevention of Corruption Act, 1988, namely, S. 13(1)(d) of the Act of 1988 from the provision under S. 5(1)(d) under the Prevention of Corruption Act, 1947. Clause (d) of S. 5(1) mandates that for constituting the offence under that clause, the accused must have used corrupt or illegal means or otherwise abused his position as public servant to obtain for himself or for any other person valuable thing or pecuniary advantage. The words “or by otherwise abusing his position as public servant” go to indicate that use of corrupt or illegal means is considered as one of the modes of abusing official position. Thus, there is only one concept involved

here, namely, abusing one's official position to gain valuable thing or pecuniary advantage. Adoption of corrupt or illegal means is mentioned illustratively as one of the means of abuse of official position. Thus, the concept of use of corrupt or illegal means has inextricable nexus with abuse of official position. Abuse of official position appears to be central to the concept of misconduct and adopting corrupt or illegal means is merely one of the ways and not unrelated to abusing official position. It is for this reason, the Supreme Court held in that case cited supra that mere use or adoption of illegal means to obtain valuable thing or pecuniary advantage unrelated to abuse of official position does not satisfy the ingredient of the offence under S. 5(1)(d) of the Prevention of Corruption Act, 1947. But, in the Act, 1988, this nexus between adoption of corrupt or illegal means and abuse of official position has been severed as can be seen by examining the relevant provision:

“13. Criminal Misconduct by a Public Servant: (1) A public servant is said to commit the offence of criminal misconduct:

(d) if he,—

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

(Emphasis supplied)

Sub-Clause (d) of S. 13(i) which is equivalent to Sub-Clause (d) of S. 5(1) of the Act, 1947 has been divided into three distinctive parts as extracted above.

A reading of this provision would make it amply clear that all the three wings of Clause (d) of, S. 13(1) are

independent and alternative and disjunctive for constituting the ingredients for the offence under S. 13(1)(d) as is clear from the use of the word 'or' at the end of each sub-clause. Thus, under S. 13(1)(d)(i) obtaining any valuable thing or pecuniary advantage by corrupt or illegal means by a public servant in itself would satisfy the requirement of Criminal misconduct under S. 13(1)(d) of the Prevention of Corruption Act, 1988. On the same reasoning "obtaining a valuable thing or pecuniary advantage merely by abusing official position" as contemplated under S. 13(1)(d)(ii) in itself would satisfy the ingredient of Criminal Misconduct under S. 13(1)(d) without any nexus with the adoption of the illegal means as contemplated under S. 13(1)(d)(i) of the Act, 1988. Thus, it would appear that there is definite change as to the ingredients of offence of Criminal Misconduct under S. 13(1)(d) of Act, 1988 as distinct from S. 5(1)(d) of the Prevention of Corruption Act, 1947. The judgments of the Supreme Court rendered while interpreting the provisions of Prevention of Corruption Act, 1947 have to be appreciated taking into account the changes incorporated in the relevant provisions in the Prevention of Corruption Act, 1988. For this reason also, the facts in this case must be held to be sufficient to constitute 'Criminal Misconduct' within the meaning of S. 13(1)(d) of the Prevention of Corruption Act, 1988.

13.10. Thus, abuse of the position by the accused is an essential element even if he acts by a corrupt or an illegal mean because though the illegal mean would survive, element of corrupt will not arise without an abuse of the official position.

13.11. As noted above in the facts of the case the appellant nowhere abused his position as a public servant. He misused his father's position as a public servant. Father of the appellant has since been acquitted and no leave to appeal has been sought by CBI. The appellant not having abused

the position as an officer, he cannot be convicted for offence punishable under Section 13 (1)(d) of the PC Act, merely because he is a public servant though the criminal act committed by him had no nexus whatsoever with his position.

14. *Issue No. 2: Whether on facts the prosecution has lead admissible evidence to prove that the appellant impersonated himself and derived illegal gratification.*

14.1. Learned counsel for appellant contended that the complainant is an interested witness thus the conviction cannot be based on his sole testimony. Further the tape recorded conversation is inadmissible in evidence being violative of the law laid down by the Hon'ble Supreme Court in Ram Singh (supra). Case of the appellant's counsel is that since witness M.K. Mehta (PW-3) heard the conversation on 13th May, 2000 through the headphone connected to the KCR device it was essential for the prosecution to prove that the KCR device had not been tampered with and should have exhibited the said device during the course of trial.

14.2. In Ram Singh (supra) Supreme Court was dealing with the tape recorded conversation. In the present case the dispute qua the recorded cassettes is only that they were sent to market to be copied as per the memo Ex.PW-2/G and PW-2/L. It is thus contended that the cassettes were not seized immediately and their sanctity was not maintained.

14.3. The fact that there was no tampering with the tape recorded conversation, even if the cassettes were sent outside for copying, is evident from the CFSL report which shows that the cassettes containing the tape recorded conversations were not tampered with and there were no chances of erasing or interpolation. The conversation in the tapes was

clearly audible and CFSL report supports it. Merely because the KCR device was not sent to CFSL would not belie the evidence of the witness M.K. Mehta (PW-3) for the reason it would be akin to a witness hearing conversation on the telephone in which case the entire wiring and the telephone instrument cannot be sent for examination to FSL as there would be no recorded conversation in the same. Even in the present case even though the tapes were sent outside for making copies they were sealed immediately thereafter and there is no tampering which is proved by the CFSL report. Further no witness has been suggested that there was tampering in the recorded conversation. As per the prosecution case voice of the appellant and the complainant appearing in the tape recorded conversation was duly identified by the complainant and the report in this regard was also given by the CFSL tallying the same with the voice samples. Further testimony of the complainant cannot be brushed aside merely because he is an interested witness, that is, interested in the success of the prosecution.

15. From the evidence of the complainant and other evidence on record it has been proved beyond reasonable doubt that the appellant committed the offence of accepting ₹50,000/- by impersonating as his father punishable under Section 419 IPC.

16. For the discussion aforesaid, the appellant is acquitted for offence punishable under Section 13 (1)(d) read with Section 13(2) of PC Act and the sentence on said count is also set aside however, the conviction of the appellant and order on sentence qua offence punishable under Section 419 IPC is upheld. Appeal is partly allowed.

17. Copy of this order be sent to Superintendent, Central Jail Tihar for updation of the Jail record. TCR be returned.

(MUKTA GUPTA)
JUDGE

MAY 23, 2018
‘vn’

