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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL No. 497 OF 2014

Ramdas Waman Tadge)
Age 41 years, Occupation Service,)
Jr. Clerk, Co-op. Society, Malegaon)
Office, Resident of Plot No.3, Sr.No. 69A)
Rawalgaon Naka, Malegaon Camp,)
Malegaon, Tal. Malegaon, Dist. Nashik)...Appellant

Versus

State of Maharashtra)
Through P.I. Anti Corruption Bureau,)
Nashik, Dist. Nashik)...Respondent

Ms. Shradha Sawant for Appellant in Appeal No. 497 of 2014
Mr. S.S. Pednekar -APP for the State

CORAM : SMT.SADHANA S. JADHAV, J.

DATE : FEBRUARY 22, 2019

JUDGMENT:

1. Heard. The Appellant herein is convicted vide judgment and order dated 27.5.2014 passed by the Additional Sessions Judge, Malegaon, Dist. Nashik in Special (A.C.B.) Case No. 01 of 2008 for the offence punishable under section 7, 12 of the Prevention of Corruption Act, 1988 and sentenced to suffer R.I. for two years

and to pay fine of Rs.2,000/-, in default, to suffer R.I. for two months. He is also convicted for the offence punishable under section 13(1) (d) r/w. 13(2) of the Prevention of Corruption Act, 1988 and sentenced to suffer R.I. for two years and to pay fine of Rs.2,000/-, in default, to suffer R.I. for two months. Such of the facts necessary for the decision of this appeal are as under.

2. The Appellant herein was working as a clerk in the office of District Sub- Auditor and in the year 2006, he holding charge as Auditor and Senior Clerk at the office of Co-operative Society at Malegaon. That on 25.7.2006, one Mr. Sunil Govind Bankar, who was serving with Sonaj Vividh Karyakari Seva Sahakari Society Ltd., situated at Malegaon, lodged a report with the Anti Corruption Bureau at Nashik (for short 'the ACB') contending therein that the accounts of his office were being audited.

3. The ACB had decided to lay a trap and had called upon two public servants to act as panchas at the time of trap. A pre-trap panchnama was conducted. The raiding party had been to the office. On 25th July, 2006, the complainant Mr. Bankar along with a panch Mr. Saundane had been to the office premises of the

auditor which was situated at Market Yard. They had been to the office of Accused No.1 Mr. Kasar. The complainant had requested the auditor to prepare the audit report properly. Thereafter, Mr. Kasar had questioned as to whether he is ready to fulfill the demand. He had received the answer in the affirmative. In the meanwhile, Accused No.2 i.e. the present Appellant had been to the office. Mr. Kasar had informed the complainant to hand over the said amount to the Appellant. The Appellant had accepted the said amount, retained it and placed it in his hip pocket of the pant. Soon thereafter, the complainant had given the pre-determined signal. The raiding party had apprehended both the accused persons. The statement of the panch was recorded. The post trap panchnama was prepared and, thereafter, PW5 had lodged a report on behalf of the State. On the basis of the said report, Crime No. 3043 of 2006 was registered at the police station. After investigation and after receipt of the sanction to prosecute by the appropriate authority, the charge-sheet was filed. The prosecution examined six witnesses to bring home the guilt of the accused.

4. PW1 Sunil Bankar is the Complainant. In his cross examination- in- chief, he has deposed in consonance with the

report which he had filed with the ACB prior to the laying of the trap. It would be necessary to mention at this stage, in the present case, the defence of Accused No.2 is that he was the junior clerk, he had no authority to prepare the audit report. He had not demanded the money in the form of bribe or gratification from the complainant and he had only obeyed his senior officer i.e. Original Accused No.1. He had accepted the amount from the complainant as he was requested to do so by the Original Accused No.1. In the present case, on this limited point, it would be necessary to appreciate on the basis of the evidence led by the prosecution as to whether the Appellant herein has committed an offence punishable under section 7,12, or 13 (1) (d) r.w. section 13(2) of the Prevention of Corruption Act, 1988.

5. PW1 has stated before the Court that on 30th June, 2006, Accused No.2 i.e. the present Appellant had taken the official records to Malegaon for auditing and thereafter, for the first time, he met him on 25th July, 2006. It is the case of Accused No.1 that the amount, which was being paid by the complainant on 25th July, 2006, was not towards a bribe, gratification or any undue advantage, but the same was being paid to the accused towards

the audit fees. It is admitted by PW1 that he had not deposited the audit fees prior to 12th July, 2006. It is reiterated and brought on record in the cross examination in the following words:

“It is true that till the date of present trap, the audit fees was not deposited by us.” i.e. by the Society.

In the cross examination, it is specifically elicited as follows:

“It is true that as a bribe, neither I paid the amount nor the same was accepted by accused.”

The said sentence could be interpreted as the amount is not extended towards bribe or illegal gratification or neither the same was accepted by the accused in the form of gratification. That he had been informed by the Original Accused No.1 Mr. P.M. Kasar that there are certain lacunas in the records of the office and they need to be corrected. It is also alleged that he had been informed by Mr. P.M. Kasar i.e. the auditor that he would have to pay Rs.8,000/- towards illegal gratification. After negotiation, the Complainant paid Rs.2,500/- to the auditor and had assured the auditor that he would pay the rest of the amount of Rs.5,500/- subsequently but at the earliest. He had also assured that he would pay the said amount on 25th July, 2006 at about 5.00 p.m. . According to the prosecution, he was not willing to pay the said

amount and, therefore, had approached the office of the ACB.

6. Section 7 A of the Prevention of Corruption Act specifically contemplates that *“even an attempt to obtain an undue advantage would amount to an offence”*. The explanation to section 7 reads as under.

“For the purpose of this section, the obtaining, accepting or the attempting to obtain an undue advantage shall itself constitute an offence even if the performance of the public duty by public servant, is not or has not been improper.”

In other words, demand of a bribe or gratification by itself would amount to an offence contemplated under Section 7 of the Prevention of Corruption Act. It would be pertinent to note that the complainant i.e. PW1 has not stated before the Court that he had come in contact with Original Accused No.2 prior to 25th July, 2006. He had met him for the first time in the office on that day.

7. PW2- Sunil Saundane, who happens to be the shadow witness, has reiterated that when he had met Accused No.1 in the cabin along with the defacto complainant, only accused No.1 was present and, thereafter Accused No.2 had been to the office. He

was asked by Accused No.1 to accept the amount and the same was accepted. There are discrepancies and ambiguities as far as the site/location of demand and acceptance. However, the said issue need not be gone into.

8. PW3 is the Sanctioning Authority Mr. Sudhakar Mehakarkar. He has stated that he had perused the papers and then granted sanction as he was competent to accord sanction. He has specifically stated that he does not recollect as to whether the draft sanction was sent along with the papers of investigation.

At this stage, the learned counsel for the Appellant submits that there is no proper application of mind while according sanction as it prima facie appears that the Sanctioning Authority had only endorsed upon the draft sanction without perusing the papers of investigation.

9. PW4 is the Special Auditor, Class-II, Co-operative Societies, Flying Squad, Nashik. He has deposed before the Court that audit

department would charge the audit fees as per the working capital of the society. After calculation of the audit fees, we used to get it deposited through *challan* in treasury.

10. PW5 Mr. Bhimashankar Dhole is the Complainant and the Investigating Officer. He had recorded the report of the defacto complainant which is marked at Exhibit 20. According to PW5, the members of the raiding party had seen that the tainted amount was being accepted by a person wearing white checks shirt. As far as the present Appellant is concerned, the deposition of PW5 would be relevant to consider the immediate disclosure by the accused after the trap.

11. In the words of PW5 *“we found one bank passbook, office key, handkerchief with Shri Tadge, which we returned to him. We asked Shri Tadge about the bribe amount, he replied that Shri Kasar told them to deposit Rs.25,000/- audit fees and this amount was regarding that.”*

Both of them gave their statements in their handwriting.

12. The thrust of the argument of the learned counsel for the

Appellant is that the present Appellant had not demanded the amount. Accused No.1 had informed the complainant that he has to deposit audit fees and accordingly, asked him to accept the amount and he had accepted the amount.

13. The learned APP submits that irrespective of the facts that there was no demand by the present Appellant, there is a statutory presumption under the Prevention of Corruption Act against the public servant, who accepts any undue advantage. It is submitted that the onus of proving that the acceptance was not an undue advantage would be shifted upon the accused. Section 20 of the Prevention of Corruption Act reads as follows:

“20. Presumption where public servant accepts any undue advantage-

Where, in any trial of an offence punishable under section 7 or under Section 11, it is proved that a public servant accused of an offence has accepted or obtained or attempted to obtain for himself, or for any other person, any undue advantage from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or attempted to obtain that undue advantage, as a motive or reward under section 7 for performing or to cause performance of a public duty improperly or dishonestly either by himself or by another public servant or, as the case may be, any undue advantage without consideration or for a consideration which he knows to be inadequate under section 11.”

14. The evidence on record would indicate that the accused has rebutted the said presumption right from the threshold of the case, inasmuch as soon after the trap, since he has categorically stated that the amount, which he had accepted was not by way of bribe or gratification, but the Complainant had insisted upon him to receive the amount towards audit fees and convinced the officer about the same.

15. By way of cross examination, it is brought on record by the defence that the performance of the society was so poor that it was classified in 'C' Category. In order to save the society from once again being classified from 'C' Category, a plot was hatched by the Secretary of the society to implicate the accused and stigmatize the officers. An attempt was being made by the Complainant to show that the classification is being made by adopting illegal means. However, the Complainant has failed to prove the guilt of the accused.

Hence, the burden cast upon the accused to rebut the presumption has been discharged by him.

16. The Hon'ble Apex Court in the case of **Selvaraj Vs. State of Karnataka [(2015) 10 Supreme Court Cases 230]** has observed as follows:

“The allegation of bribe taking should be considered along with other material circumstances. Demand has to be proved by adducing clinching evidence. Recovery of tainted money is not sufficient to convict the accused.

There has to be corroboration of the testimony of the complainant regarding the demand of bribe.”

The Apex Court further observed as follows:

“the prosecution has to prove the charge beyond reasonable doubt like any other criminal offence and the accused should be considered innocent till it is proved to the contrary by proper proof of demand and acceptance of illegal gratification, which is the vital ingredient to secure the conviction in a bribery case.”

The Hon'ble Apex Court in the case of **C. Sukumaran Vs. State of Kerala [(2015) 11 Supreme Court Cases 314]** has observed as follows:

“It has been continuously held by this Court in a catena of cases after interpretation of the provisions of Section 7 and 13(1) (d) of the Act that the demand of illegal gratification by the accused is the sine qua non for constituting an offence under the provisions of the act. Thus, the burden to prove the accusation against the appellant for the offence punishable under Section 13(1) (d) of the Act with regard to the acceptance of illegal gratification from the complainant PW2, lies on the prosecution.”

In the case of **N. Sunkanna Vs. State of Andhra Pradesh [(2016) 1 Supreme Court Cases 713]**, the Apex Court held as follows:

“It is settled law that mere possession and recovery of the currency notes from the accused without proof of demand

will not bring home the offence under Section 7, since demand of illegal gratification is sine qua non to constitute the said offence. The above also will be conclusive insofar as the offence under Section 13(1) (d) is concerned as in the absence of any proof of demand for illegal gratification the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established. It is only on proof of acceptance of illegal gratification that presumption can be drawn under Section 20 of the Act that such gratification was received for doing or forbearing to do any official act. Unless there is proof of demand of illegal gratification proof of acceptance will not follow.”

In the case of **C.M. Girish Babu Vs. CBI [(2009) 3 SCC 779]**, the Apex Court has held as follows:

“It is well settled that the presumption to be drawn under Section 20 is not an inviolable one. The accused charged with the offence could rebut it either through the cross-examination of the witnesses cited against him or by adducing reliable evidence.

It is equally well settled that the burden of proof placed upon the accused person against whom the presumption is made under Section 20 of the Act is not akin to that of burden placed on the prosecution to prove the case beyond a reasonable doubt.”

In the case of **Trilok Chand Jain Vs. State of Delhi [AIR 1977 Supreme Court Cases 666]**, the Apex Court has held as follows:

“The degree and the character of the burden of proof which Sec. 4(1) casts on an accused person to rebut the presumption raised thereunder, cannot be equated with the degree and character of proof which under Section 101. Evidence Act rests on the prosecution. The presumption can be used in furtherance of the prosecution case and not in derogation of it. If the story set up by the prosecution inherently militates against or is inconsistent with the fact presumed, the presumption will be rendered sterile from its very inception, if out of judicial courtesy it cannot be rejected out of hand as still-born.”

In the facts and circumstances of the present case, implicit reliance can be placed on the judgment of this Court in the case of **Dnyaneshwar Laxmanrao Wankhede Vs. State of Maharashtra [2006 (1) Bom. C.R. (Cri.) 131]**, wherein the Court has observed as follows:

“In the result, the test to be applied is, whether the facts, primary to proof of facts of acceptance and payment of bribe was initially proved enough to the extent and level of the raising presumption, and if so, what is the weight of the defence raised by the accused was adequate enough to create preponderance of proof of his defence being factual and probable.”

It is incumbent upon the prosecution to prove demand and acceptance. Acceptance devoid of any demand would be of no significance. Especially when the accused has rebutted the presumption by demonstrating preponderance of probabilities. It is clear from the evidence of the complainant that the appellant had received the amount upon instructions of the co-accused. The de-facto complainant has no grievance against the present appellant at all.

17. Upon appraisal of the records and proceedings and upon perusing the statement of Accused No.2 given to the Investigating Officer, at the threshold, soon after the trap shows that Mr. Kasar had asked him to accept the report of the panch committee and the amount for depositing audit fees. That after counting the money, accused No.2 had informed the superior officer that the amount was not being fully paid for satisfying the audit fees. In that eventuality, accused Nos. 1 had asked accused No.2 not to accept the amount unless the whole of the audit fees is deposited. At that juncture, the complainant had coaxed Accused No.2 to have a cup of tea and was insisting upon him to accept the amount and help him. It was at that juncture that the raiding party had

apprehended accused No.2. The evidence of PW5 has to be read in the light of these circumstances where he has stated that he had actually seen a person wearing checks shirt, accepting the amount. In the eventuality that the amount was paid in the cabin of accused No.1, there was no occasion for the raiding party to see the act of acceptance. In the light of this, the reason for cross examining the witnesses on the point of scene of offence at length, would assume importance. In the light of these circumstances, the prosecution has not been able to establish as to whether the amount has been accepted by Accused No.2 in the cabin of accused No.1 or on the road. This fact would assume significance. It is clear that the demand of audit fees was to the tune of Rs.11,100/- and the complainant had brought Rs.5,500/- towards audit fees. The presumption as far as Accused No.2 stands rebutted by itself in the absence of any demand by Accused No.2. The defacto complainant had also filed a report only against Original Accused No.1 to the ACB as the demand was made by him and according to the complainant, the complainant was to pay the said amount to Accused No.1. The raiding party was also not aware that the money would be accepted by accused No.2 and be recovered from him.

Needless to mention that there is inherent discrepancy in the evidence of the complainant and the shadow witness in respect of the scene of offence. It is in these circumstances, Accused No.2 deserves to be acquitted of all the charges leveled against him. Explanation given by the accused soon after the trap stands on a higher footing than any other material adduced by the accused by way of cross-examination or under section 313 of Cr.P.C. since it is not an afterthought nor a defence suggested by an advocate.

18. All these circumstances, would lead the Court to infer that the prosecution has failed to prove the offence against Accused No.2 beyond reasonable doubt. Hence, the appeal is allowed by passing the following order:

ORDER

- (i) Criminal Appeal is allowed and stands disposed of.
- (ii) The judgment and order dated 27.5.2014 passed by the Additional Sessions Judge, Malegaon, Dist. Nashik in Special (A.C.B.) Case No. 01 of 2008 is hereby quashed and set aside.
- (iii) The Appellant be acquitted of the offences punishable under Sections 7, 12 and 13 (1) (d) r.w. Section 13(2) of the Prevention of Corruption Act, 1988.
- (iv) Bail bonds are cancelled.

- (v) Fine amount, if paid, be refunded.
- (vi) Writ be issued expeditiously.

[SMT.SADHANA S. JADHAV, J.]

V.A. Tikam