**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

RESERVED ON : 29.03.2019
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CORAM:

**THE HONOURABLE MR.JUSTICE M.DHANDAPANI**

**Criminal Appeal(MD) No.104 of 2014**

State of Tamil Nadu rep. by
The Inspector of Police,
Department of Vigilance and
Anti Corruption,
Virudhunagar
Crime No.5 of 2002 .. Appellant/Complainant

Vs.

S.Tamizhselvan,
Clerk,
Rajapalayam Taluk Co-operative Housing
Society Ltd.,
Virudhunagar .. Respondent/Accused

**Prayer** : Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, to set aside the Judgment of acquittal passed by the Special Judge for Prevention of Corruption Act Cases, Madurai in Spl.C.C.No.132 of 2011 dated 28.05.2013 convict and sentence the respondent/accused.

For Appellant :: Mr.K.K.Ramakrishnan,
Additional Public Prosecutor

For Respondent :: Mr.G.Mariappan

**J U D G M E N T**

This appeal is directed against the order of acquittal against the respondent passed by the Special Judge for Prevention of Corruption Act Cases, Madurai in Spl.C.C.No.132 of 2011 dated 28.05.2013 and to convict and sentence the respondent/accused.

2.The gist of the charge framed on the accused is as follows:

| ***Charge*** | ***Gist of Charge*** |
|---|---|
| Section 7 of Prevention of Corruption Act, 1988. | Public Servant taking gratification other than legal remuneration in respect of an official act. |

| *Charge* | *Gist of Charge* |
|---|---|
| Section and 13 (1) (a) & (d) read with 13(2) of Prevention of Corruption Act, 1988. | Accused receiving a sum of Rs.300/- as bribe for giving the cheque. |

3.For the sake of convenience, the parties are referred to as per the rank mentioned in the trial Court. The brief facts of the prosecution case are as follows:

(i) The accused was working as a Clerk in Rajapalayam Taluk Co-operative Housing Society Ltd.,Virudhunagar P.W.2 is a resident of Mugavoor Village, Rajapalayam Taluk. On 24.04.2002, for the purpose of constructing a house owned by him in Mugavoor village, he and his daughters became members of the above said Society. On 29.04.2002, he submitted an application for loan of Rs.25,000/- to construct a house before the said Society. On 11.07.2002, he received the initial payment of Rs.10,000/- through cheque and he was informed to get the second instalment of Rs.7,500/- after 15 days. On 21.08.2002, when he went to the Society along with his friend Pandiyarajan, P.W.3 and enquired about the second instalment, the newly Secretary viz., one Murugan asked them to meet the Clerk Tamizhselvan and accordingly, when P.W.2 met the accused viz., Tamizhselvan, he informed that only if he pays a sum of Rs.300/- as bribe, the Secretary would sign the cheque and asked him to come next day with money. Since P.W.2 has decided not to give the amount as demanded by the accused, he along with his friend went to the Vigilance and Anti-Corruption Office, where the Deputy Superintendent of Police informed him to give a complaint. Accordingly, he went to the nearby shop and dictated the complaint to a person, who written the same, where, P.W.2 signed and his friend Pandiarajan also signed as witness and he gave the said complaint to the Deputy Superintendent of Police. The complaint is marked as Ex.P2.

(ii). P.W.10 - the Inspector of Police received the complaint given by P.W.2 on 22.08.2008 at 10.30 a.m. under Ex.P2 and registered a case in Crime No.5 of 2002 under Section 7 of Prevention of Corruption Act, 1988 against one Murugan, Secretary and Tamizhselvan, Clerk of the Rajapalayam Taluk Co-operative Housing Society Ltd., Virudhunagar. Ex.P.32 is the First Information Report.

(iii) P.W.10, the Trap Laying Officer, thereafter sent intimation to the office of the Deputy Commissioner of Commercial Tax and to the office of the Assistant Commissioner of Hindu Religious and Charitable Endowment department to send two witnesses for the purpose of conducting a trap. Accordingly, P.W.4 from the office of the Deputy Commissioner of Commercial Tax, who was working as Assistant Commercial Tax Officer and one Vijayakumar from the

Hindu Religious and Charitable Endowment department came to the Vigilance and Anti-Corruption Office at Virudhunagar on 22.08.2002 at 11.30 a.m. P.W.10 introduced P.W.2 to P.W.4 and another witness Vijayakumar and explained about the complaint given by P.W.2 and thereafter demonstrated the phenolphthalein test. P.W.10 further instructed P.W.2 to give the bribe amount after the demand made by the accused and thereafter to come out and give the signal by folding his dhoti. The said proceedings of the Vigilance and Anti-Corruption Office were recorded under the mahazar Ex.P4.

(iv) On 22.08.2002 at 01.00 p.m. the raiding party left the Vigilance and Anti- Corruption Office in the private vehicle bearing Reg.No.TN.67 B 6662 along with P.W.2 and other trap witnesses. They reached Rajapalayam at about 2.00 p.m. P.W.10 instructed P.W.2 to go along with P.W.4 to the office of the accused. The raiding party was waiting nearby there for the signal of P.W.2.

(v).P.W.2 went inside the office of the accused along with P.W.4. However, at about 05.30 p.m. they returned and informed P.W.10 that both the Secretary and the Clerk/respondent herein were not available in the office and when they enquired, they came to know that they gone to recover the loan amount and they would come by 4.00 p.m. and even upto 05.30 p.m., they did not come and hence, they left the office. Therefore, the raiding party returned back to Virudhunagar DVAC office and the amount was kept in safety locker under mahazer Ex.P5. Therefore, on the next day, i.e. on 23.08.2002, at 8945 a.m., the left the office and reached Rajapalayam at 9.45 a.m., and P.W.2 and P.W.4 were remained the instructions already given with regard to the the pre trap proceedings and they went to the office of the accused. The accused asked P.W.2 whether he has brought the amount. P.W.2 took out the currency notes Rs.300/- and gave the amount to the accused, which was received by the accused and after counting the same, he put the amount inside the drawer. He gave a cheque for a sum of Rs.6,800/- after deducting the amount of Rs.700/- towards the loan and gave a receipt for the said sum of Rs.700/-, which are marked as Ex.7 and 8 respectively. Thereafter, both P.Ws.2 and 4 left out the office of the accused and P.W.2 has given the prearranged signal. P.W.10 along with the raiding party and P.W.4 rushed inside the office of the accused and introduced himself and others to the accused. P.W.2 stood outside of the office. P.W.4 identified the accused. At that time, the accused stood up and opened the drawer by his right hand and took the amount with his right hand and throw it on the floor. At that time, the accused was found perplexed and nervous.

(vi)Thereafter, P.W.10 asked the accused about the bribe amount received from P.W.2, for which, he stated that the same is in the drawer. P.W.10 prepared sodium carbonate powder solution and requested the accused to dip his hand fingers and the solution turned pink in colour. P.W.10 enquired about the bribe amount and the accused took out the said amount from the drawer and handed over the same to P.W.10, which was marked as M.O.1. P.W.10 compared the same with the mahazar prepared at the office under Ex.P.5. Thereafter, P.W.10 searched the office, where, the accused produced the documents with regard to the loan particulars obtained by P.W.2, which were marked as Ex.P12 to 18. P.W.10 recovered the same under Ex.P10. The trap proceedings took place at the office of the accused were recorded under Mahazar Ex.P11. On enquiry, since the accused told that Murugan, the Secretary was not insisted to get the bribe amount and he himself asked the same, and he has not connected with the offence, P.W.10 arrested the accused/respondent herein only. They searched the house of the accused under Ex.P19. Since they came to know that P.W.2 gone to bank to encash the cheque, they also went to bank. However, P.W.2 encahsed the same. Therefore, P.W.10 requested the bank Manager/P.W.6 to cancel the cheque and recover the cheque Ex.P7 and receipt Ex.P8 through mahazer Ex.P9. Thereafter, he sent the accused to the Court for sending him to judicial custody.

(vii) P.W.10, the Deputy Superintendent of Police, Vigilance and Anti-Corruption took up further investigation in this case. He has examined the witnesses and recorded their statements. He has given requisition to the Magistrate Court to send the Sodium Carbonate Solution for chemical examination. He sent requisition dated 30.04.2006 to P.W.1 to get sanction to prosecute against the accused. Accordingly, P.W.1 gave sanction Ex.P1 to prosecute against the accused. P.W.1 received the Pending investigation, the Secretary, who was shown as accused in FIR died and his death certificate is marked as Ex.P36. After examining the remaining witnesses and after completion of investigation, P.W.12 filed the charge sheet in this case on 31.08.2005 against the accused for the offence under Sections 7 (13)(1)(d) r/w. 13(2) of the Prevention of Corruption Act, 1988.

4.To substantiate the charges against the accused in trial, on the side of the prosecution, P.Ws.1 to 12 were examined and Exs.P.1 to 38 were marked and M.Os.1 to 3 were produced. When the accused was questioned about the incriminating circumstances and evidence, he denied the charges levelled against him. In order to disprove the case of prosecution, the accused examined D.W.1 and Ex.D1 to D6 were also marked.

5.Upon consideration of the oral and documentary evidence, though the learned Judge found that the demand illegal gratification and the acceptance of bribe amount is proved by the evidence of P.Ws.2 and 4 and through paragraphs 39 and 60, acquitted the accused on the ground that the prosecution has not followed the procedures mandated under DVAC manual. The learned Judge also held that the sanction order to prosecute the accused was obtained after 21 months from the date of occurrence and there is no proper explanation for the delay in getting the sanctioning order and considering the prosecution has violated the procedures mentioned in para 47 of the DVAC manual in not recording the statement from the accused immediately after the proceedings of trap. Against which, this present appeal has been filed before this Court by the State.

6.The respondent has filed a revision in Crl.R.C.(MD) No.SR 5420 of 2014 before this Court to set aside the impugned findings recorded in para 39 and 60 of the Judgment by the learned Judge for Prevention of Corruption Act Cases, Madurai in Spl.C.C.No.132 of 2011 dated 28.05.2013. However, this Court dismissed the revision in the SR stage itself giving liberty to the respondent/accused to raise all the points before this Court in this Appeal.

7.Assailing the findings of the trial Court, the learned Additional Public Prosecutor would submit that P.W.2 is the defacto complainant and P.W.4 is the shadow witness and P.W.3, who is the friend of P.W.2 were examined to prove the demand and acceptance. Initially, P.W.2 became a member of the Housing Society to obtain loan for construction of a house. Thereafter, he made an application to the Housing Society on 29.04.2002 for getting loan of Rs.25,000/- and accordingly, he received the first instalment of Rs.10,000/- on 11.07.2002. On 21.08.2002, when he enquired the second instalment, the accused informed that only if he pays a sum of Rs.300/- as bribe, the new Secretary would sign the cheque. Since P.W.2 did not want to pay the bribe amount, he preferred a complaint through a person in a petty shop near by the DVAC office and presented the same to P.W.10, the Inspector of Police. P.W.10, who received the said complaint, registered a case in crime No.5 of 2002 for the offence under Section 7 of P.C. Act and arranged pre-trap proceedings with P.W.4 and others. Thereafter, the trap proceedings was conducted on 23.08.2002 and in the presence of P.W.4, the accused demanded a sum of Rs.300/- from P.W.2 and accepted the bribe amount from the left hand and put the same in his drawer.

8.The learned Additional Public Prosecutor is that P.W.2 and 4 have cogently deposed about the trap proceedings and the evidence of P.W.3 also corroborate the same and thereby, the prosecution has established the demand acceptance before the trial Court and the trial Court also found through paragraph 39 and 60 of the judgment that the demand and acceptance by the accused was proved. However, the trial Court acquitted the accused only on the ground that the prosecution has not followed the DVAC manual, which is unsustainable in law. In a similar circumstances, this Court has held that the delay in getting sanction to prosecute against the accused is not vitiated the entire prosecution. In support of the case of the prosecution, the learned Additional Public Prosecutor relied on the following decisions of the Hon'ble Supreme Court:

1.***(1999) 8 Supreme Court Cases 501 - Ventral Bureau of Investigation V. V.K.Sehgal,*** wherein, the Apex Court, in paragraph No.17, has held as follows:

> "17.It is a further inroad into the powers of the appellate Court over and above the trammel contained in Section 465 of the Code which has been dealt with supra. Under Section 19(3)(a) no order of conviction and sentence can be reversed or altered by

a Court of appeal or revision even "on he ground of absence of sanction" unless in the opinion of that court a failure of justice has been occasioned thereby. By adding the explanation the said embargo is further widened to the effect that even if the sanction was granted by an authority who was not strictly competent to accord such sanction, then also the appellate as well as revisional courts are debarred from interfering with the conviction and sentence merely on that ground."

2.***(2001) 4 Supreme Court Cases 525 - Seeta Hemchandra Shashittal and another***, wherein, the Apex Cour,t in paras 20 and 21, had held as follows:

"20.The delay taken for obtaining sanction from the Government cannot be attributed to the investigating officers. As pointed out earlier, sanction was applied for 0n 06.04.1992 and the Government accorded sanction on 21.02.1993. Though we are unable to approve of the said time of two years for the Government to decide the question of giving sanction, considering the number of desks over which the matter had to pass, and the voluminous records to be studied at all levels, we hesitate to hold that the said interval was no unreasonably long as to affect the fundamental right of the appellants. The charge-sheet was laid within a few days of obtaining the sanction.

21.For the aforesaid reasons we are not inclined to quash the criminal prosecution merely on the ground of delay highlighted by the appellants."

9.Per contra, the learned counsel appearing for the respondent/accused would submit that since the trial Court has found the demand and acceptance by the accused, the respondent/accused approached this Court by filing criminal revision.

10.The first limb of the argument advanced by the learned counsel appearing for the respondent is that with regard to prove the demand and acceptance, the prosecution examined P.Ws.2 and 4. P.W.2 in his evidence deposed that after receiving the first instalment on 11.07.2002, he again met the accused on 21.08.2002 and at that time, the accused demanded Rs.300/- in the presence of P.W.3. However, P.W.3, who is the friend of P.W.2 and accompanied to the office of the accused on 21.08.2002, has deposed in his evidence that accused had informed P.W.2 that only if he pays a sum of Rs.300/- as bribe, he would give the cheque and he further informed that in that amount of Rs.300/-, the Secretary Murugan also gets share and thereafter, the next day morning they gave complaint to P.W.10. The said evidence is contrary in nature. A bare perusal of Ex.P7 cheque and receipt Ex.P8 would show that the cheque was prepared on 17.08.2002 itself in favour of P.W.2, in which the Secretary and the Special Officer signed in the backside and on the same day itself, the receipt for a sum of Rs.700/- also was prepared, in which also, P.W.2 signed. When the accused prepared the cheque and receipt on 17.08.2002 itself, the version of P.Ws.2 and 3 that on 21.08.2002, the accused demanded and stated that only if e pays Rs.300/- as bribe, the Secretary would sign the cheque is imaginary and unsustainable one.

11.The entire case of prosecution is motive and issuance of second instalment does not arise as evident from Ex.D6, where, it has been mentioned that on 10.07.2002, Rs.17,500/- has been disbursed and on 23.08.2002, Rs.7,500/- has been disbursed in favour of the defacto complainant. Therefore, the prosecution has not established the case beyond the reasonable doubt. He further submitted that the evidence of P.W.5, the Special Officer of the Housing Society would show that first instalment was disbursed on 10.07.2002 and the cheque for the second instalment was prepared on 17.08.2002, in which P.W.5 and Chandrasekaran, Secretary have signed and in the back side of the cheque, Ex.P7, Secretary Murugan also has signed. His evidence has clearly proved that the second due was paid on 17.08.2002 itself. Therefore, when the second instalment was paid on 17.08.2002 itself, the question of demand and acceptance of bribe on 21.08.2002 and mere recovery of amount will not sufficient to prove the demand acceptance. He would further submit that the usual procedure of granting loan is concerned, after completing the foundation stage only, first instalment would be sanctioned and after completing the lintel stage only, the second instalment would be sanctioned and since the respondent asked the defacto complainant about the stage of construction when P.W.2 came to the office of the accused, he entered into a quarrel with the accused and he told that he do not want any housing loan from the Society and hence, he did not receive any amount. The prosecution does not discharge the initial burden with regard to the demand and acceptance immediately after the trap proceedings. In support of his argument, he relied upon the following decisions:

1.***(2017) 3 Supreme Court Cases (Cri) 699 - V.Sejappa Vs. State***, wherein, the Hon'ble Apex Court has held as follows:

> “20. In ***State of Kerala and Anr. v. C.P. Rao (2011) 6 SCC 450***, it was held that mere recovery of tainted money is not sufficient to convict the accused and there has to be corroboration of the testimony of the complainant regarding the demand of bribe.
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> 21. While dealing with the contention that it is not enough that some currency notes were handed over to the public servant to make it illegal gratification and that the prosecution has a further duty to prove that what was paid was an illegal gratification, reference can be made to following observation in ***Mukut Bihari and Anr. v. State of Rajasthan (2012) 11 SCC 642***, wherein it was held as under:-

"11. The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused, when the substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as bribe. Mere receipt of amount by the accused is not sufficient to fasten the guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification, but the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness and in a proper case the court may look for independent corroboration before convicting the accused person."

2.***2011(3) MWN (Cr.) 322 - A.S.Kannan V. State***, wherein, the Hon'ble Apex Court has held as follows:

"43. But, he has not offered any satisfactory explanation for the abnormal delay i.e.nearly 1 = years for according sanction to launch prosecution against the appellant. It is significant to note here that along with the requisition from the Director of Vigilance and Anti-Corruption dated 28.07.2000 the materials viz. first information report, statement of witnesses, mahazar etc., were tagged for the evaluation and examination of P.W.1. However, he took such an unexplained time to accord sanction, which amounts to lack of devotion to duty on his part in absence of just and proper explanation for which he is liable not only for the departmental proceedings, but also for the contempt of Court. In K.V.Joseph vs. State of Gujarat, 1997 (3) Cr.LJ 2896, the Gujarath High Court has dealt with several aspects relating to the issue of sanction and held as follows:

"When a legislature in its wisdom has named the authority which is competent to grant the sanction, there is no question or need of any advisory board coming to the aid of such competent authority. For the purpose of that case, the competent authority is exercising the powers of the Government on behalf of the Government. Thus, sanction is not only entirely and exclusively a matter of the subjective satisfaction of the sanctioning authority but it is absolute."

It is also held that:

"No authority for that purpose even the Vigilance Commission has any right to advice the sanctioning authority in the matter of granting sanction, as discretion to grant sanction is exclusively and absolutely vested in the sanctioning authority."

Apart from this, the Gujarath High Court has also held that:

"Once the proposal to grant sanction under Section 19 of the Corruption Act is forwarded by the Investigating Agency to the competent authorities then to delay the same in passing appropriate order beyond the period of two months amounts to lack of devotion to duty on his part in absence of just and proper explanation for which he is liable to not only departmentally proceeded with, but also for the contempt of this Court for disregarding the direction given by this Court in case of State of Gujarat vs. M.M.Damor, 1996 (37) Guj.LR 620."

3.***2017(3) MWN (Cr.) 435 - S.P.Tamilarasan V. State***, wherein, this Court has held as follows:

"20. Likewise, he relied upon the ruling of this Court reported in 2012(3) MWN(Cr.) 380 in P.PALRAJ Vs. STATE, REP. BY INSPECTOR OF POLICE, VIGILANCE AND ANTI-CORRUPTION WING, THOOTHUKUDI, wherein it has held as follows:-

> "13. It is the bounden duty of the trap laying officer to examine the accused immediately after the arrest at the place of trap and failure in following the Rule would vitiate the procedures. P.W.7, the trap laying officer did not examine the appellant after the arrest as to his explanation for the possession of money. The tainted money was not recovered from the possession of the appellant, but from P.W.5. In this context, it is advantageous to extract the provisions available under Rule 47 of DAVC Manual...."
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> 21. In the case on hand, following the above said Rulings, it is contended by the learned counsel for the appellant that the failure on the part of the Trap Laying Officer to record the statement of the accused immediately after arresting him is fatal to the case of the prosecution. However, refuting the same, the learned Additional Public Prosecutor contended that it is not mandatory to record such statement and Inspector of Police is not expected to record any statement which is not admissible in evidence. In Para 10 (a) of the counter filed by the respondent, it is stated that the Trap Laying Officer cannot be expected to record any statement (statement of accused) which is not admissible in evidence and the Vigilance manual is only directory in nature for the observation by the personnel of the department and has no sanctity of law and cannot be enforced. However, following the above said Rulings relied upon by the appellant it is clear that if the TLO fails to record the statement of accused, immediately after the arrest, the same will be fatal to the prosecution case. "

12.The second limb of the argument advanced by the learned counsel for the respondent/accused is that the petitioner is not a public servant defined under Section 19(1)(a)(c) of Prevention of Corruption Act. The Government is not a shareholder in the above said Society and the respondent has not received any salary from the Government. The entire salary was disbursed on the own fund of the Society. Hence, the petitioner will not come within the purview of public servant and the prosecution has not followed the procedures. In support of his contention, he relied upon the following decisions:

***(2002) 7 Supreme Court Cases 636 – State of Maharastra V. Prabhakarrao,*** wherein, the Hon'ble Apex Court has held as follows:



> "3. Under clause (iii) of Section 2(c), any person in the service or pay of a corporation

established by or under a Central, Provincial or State Act or an authority or a body owned or controlled or aided by the Government and under clause (ix) the President, Secretary and other office-bearers of a registered cooperative society engaged in agriculture, industry, have been included in the definition of "public servant".

13.The third limb of argument of the learned counsel appearing for the respondent is that the sanction to prosecute the accused obtained after 21 months from the date of occurrence and the statement of the accused has not been recorded immediately after the trap proceedings and the same is vitiate the entire prosecution case. In support of his contention, he relied upon the following decisions:

1.***1997 Cri.L.J. 2896 - K.V.Joseph V. State of Gujarat***
2.***2004 Crl.L.J. 3754 - K.Selvaraj Vs. State***
3.***2015(3) MWN (Cr.) 245 (SC) - Nanjappa V. State of Karnataka***, wherein, the Hon'ble Supreme Court has held as follows:

"17. In the case at hand, the Special Court not only entertained the contention urged on behalf of the accused about the invalidity 22 Page 23 of the order of sanction but found that the authority issuing the said order was incompetent to grant sanction. The trial Court held that the authority who had issued the sanction was not competent to do so, a fact which has not been disputed before the High Court or before us. The only error which the trial Court, in our opinion, committed was that, having held the sanction to be invalid, it should have discharged the accused rather than recording an order of acquittal on the merit of the case. As observed by this Court in Baij Nath Prasad Tripathi's case (supra), the absence of a sanction order implied that the court was not competent to take cognizance or try the accused. Resultantly, the trial by an incompetent Court was bound to be invalid and non-est in law.

18. To the same effect is the decision of this Court in Mohammad Safi vs. The State of West Bengal (AIR 1966 SC 69). This Court observed:

"As regards the second contention of Mr. Mukherjee it is necessary to point out that a criminal court is precluded from determining the case before it in which a charge has been framed otherwise than by making an order of acquittal or conviction only where the charge was framed by a court competent to frame it and by a court competent to try the case and make a valid order of acquittal or conviction. doubt, here the charge was framed by Mr. Ganguly but on his own view he was not competent to take cognizance of the offence and, therefore, incompetent to frame a charge. For this reason the mere fact that a charge had been framed in this case does not help the appellant.

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12. In addition to the competent of the court, s. 403 of the Code speaks of there having been a trial and the trial having ended in an acquittal. From what we have said above, it will be clear that the fact that all the witnesses for the prosecution as well as for the defence had been examined before Mr. Ganguly and the further fact that the appellant was also examined under s. 342 cannot in law be deemed to be a trial at all. It would be only repetition to say that for proceedings to amount to a trial they must be held before a court which is in fact competent to hold them and which is not of opinion that it has no jurisdiction to hold them. A fortiori it would also follow that the ultimate order made by it by whatever name it is characterised cannot in law operate as an acquittal. In the Privy Council case it was interpreted by Sir John Beaumont who delivered the opinion of the Board to be an order of discharge. It is unnecessary for us to say whether such an order amounts to an order of discharge in the absence of any express provision governing the matter in the Code or it does not amount to an order of discharge. It is sufficient to say that it does not amount to an order of acquittal as contemplated by s. 403(1) and since the proceedings before the Special Judge ended with that order it would be enough to look upon it merely as an order putting a stop to the proceedings. For these reasons we hold that the trial and eventual conviction of the appellant by Mr. Bhattacharjee were valid in law and dismiss the appeal."

19. In Babu Thomas (supra) also this Court after holding the order of sanction to be invalid, relegated the parties to a position, where the competent authority could issue a proper order sanctioning prosecution, having regard to the nature of the allegations made against accused in that case."

3.***(2014) 11 Supreme Court Cases 431 - P.L.Tatwal V. State of M.P.*** wherein, the Hon'ble Supreme Court has held as follows:

> "8. The Administrator is only an ad hoc arrangement made by the Government under Section 424 of the Madhya Pradesh Municipal Corporation Act, 1956 when an elected committee is superseded or dissolved. It so happened that the appointment of the appellant was at a time when the Municipal Corporation was ruled by the Administrator. That does not mean that there should be an Administrator to take any decision with regard to the sanction for prosecution of the appellant under the PC Act.
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> 9. The Statute is very clear that the authority competent to remove an officer from service is the authority to give sanction for prosecution. In the case of the appellant, being an employee having a salary of more than Rs.400/- per month, the authority competent to remove him from service is the Standing Committee. It is the Standing Committee which gave the sanction by its order dated 27.08.1996. Therefore, the trial court and the High Court cannot be faulted in taking the view that there was an 6 Page 7 order of sanction for prosecution from the competent authority.
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> 10. It is vehemently contented by the learned counsel for the appellant that there is no proper and valid sanction for prosecuting the appellant. The authority has not applied its mind and has not taken a conscious decision by referring to any of the relevant materials. It is pointed out that the authority has only accepted the recommendations of the Commissioner. But there is nothing to show that the recommendation was before the authority. Still further, it is pointed out that the order of sanction does not indicate reference to any material; however, the enclosures give an indication that the inquiry report of the Special Police Establishment and government letter were before the competent authority.

Thus, the learned counsel appearing for the respondent prayed for the dismissal of the appeal.

14.Heard the learned Additional Public Prosecutor appearing for the State and the learned counsel appearing for the respondent/accused and perused the materials available on records.

15.Since this appeal is against acquittal, this Court, as the appellate Court, has to consider the general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal. The Apex Court has observed certain principles in the decision reported in (2007) 4 Supreme Court Cases 415 - Chandrappa V. State of Karnataka. The relevant paragraph No.42 is extracted herein:



> **42.** From the above decisions, in our considered view, the following general principles

regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(*1*) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.



(*2*) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(*3*) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(*4*) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(*5*) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

16.Keeping in mind the above said principles and also upon careful re-assessment of the evidence and the judgment of the Trial Court and other materials on record and submissions made by the learned counsel appearing for the parties, the following points arise for consideration in this Criminal Appeal:

**POINTS FOR CONSIDERATION:**

(i) Whether the demand, acceptance made by the accused is proved beyond reasonable doubt?

(ii) Whether the first respondent is a public servant as per Section 2(c)(iii) of the Prevention of Corruption Act?



(iii)Whether the delay in sanctioning the prosecution would vitiate the entire prosecution case?

(iv) Whether it is mandate to follow the DVAC manual and if not followed, whether it would vitiate the entire prosecution case?

***DEMAND AND ACCEPTANCE:***



17.To prove the demand made by the accused, the crucial witnesses are P.Ws.2 and 4 were examined. P.W.2 Solaiappan is the defacto complainant. P.W.3 is the friend of P.W.2, who accompanied with him during the occurrence. P.W.4 is the shadow witness. There is no dispute that P.W.2 is a member of Housing Society and his membership also proved by marking Ex.P20 and thereafter, he made an application for housing loan under Ex.P12 and there is also no dispute with regard to the sanction of loan amount in favour of P.W.2. Accordingly, he received the first instalment of Rs.10,000/- on 11.07.2002. It is also admitted that the second instalment was also made ready on 17.08.2002 and the same was proved under Exs.P7 and 8. On perusal of the above documents makes it clear that the second instalment was made ready to P.W.2 on 17.08.2002 itself. However, when P.W.2 asked the accused about the second instalment, he demanded a sum of Rs.300/- for illegal gratification. A cumulative reading of the evidence of P.Ws.2 and 3, who is the friend of P.W.2 would show that when they went to the office of the accused on 21.08.2002, the accused informed P.W.2 that if he did not pay a sum of Rs.300/- the Secretary will not sign the cheque and if he pays the same, he would sign the same. P.W.2 in his evidence has clearly stated that since the loan was obtained only for interest, he did not want to pay the amount as demanded by the accused and hence, he preferred the complaint before the DVAC. Though the complaint was not written by P.W.2, it was written by a person, who was sitting the petty shop situated near to the DVAC office and the same was presented before P.W.10, Trap Laying Officer. Therefore, this Court finds that there is no discrepancy in the evidence of P.Ws.2 and 3 with regard to the demand made by the accused.

18.To prove the acceptance made by the accused, P.Ws.2, 4 and 10 were examined. After receiving the complaint from P.Ws.2, P.W.10 registered the case in crime No.5 of 2002 for the offence under Section 7 of P.C.Act and arranged shadow witnesses for trap and after completing the pre-trap proceedings, went to the office of the accused to conduct the trap proceedings along with P.Ws.2, 4 and other witnesses. P.W.4 in his evidence clearly stated that when they went to the office of the accused, on seeing P.W.2, the accused asked whether he brought money, for which, P.W.2 gave the currency notes to the accused and the accused received the same and counted the said money and put the same in his drawer. On a simultaneous reading of the evidence of P.Ws.2 and 4, they have clearly corroborated each other and the phenolphthalein test was also ended in positive against the accused and the shadow witnesses have no enmity against the accused Officer and they are independent witnesses. Even a bare perusal of the judgment of the lower Court, in para 39 and 60, the Trial Court itself found that the demand and acceptance made by the accused is proved by the prosecution.

19.P.W.16, Manager of Rajapalayam Co-operative Urban Bank Ltd., in his evidence has deposed that he obtained signature from the defacto complainant on 23.08.2002 before disbursing the amount of Rs.6,800/-. P.W.2 also in his evidence that immediately after the trap proceedings, he collected the cheque and rushed to the bank and encashed the same. Thereafter, P.W.10, Trap Laying Officer came to the bank and enquired P.W.6 and enquired about the cheque, where he was informed that the cheque amount was encashed at about 11.00 a.m. by P.W.2. and P.W.10 called P.W.2 and paid a sum of Rs.6,800/- and got returned the cheque after cancellation of the same by P.W.6. They were marked as Exs.P7 and 8. In the said cheque P.W.2 has put his signature before disbursing the amount. Perusal of the loan account papers would clearly corroborate the same. There is no discrepancy in the above documents. Therefore, this Court is of the view that the prosecution has proved the demand and acceptance made by the accused beyond reasonable doubt. Therefore, the decisions relied on by the learned counsel for the respondent in ***(2017) 3 Supreme Court Cases (Cri) 699 - V.Sejappa Vs. State, 2011 (3) MWN (Cr.) 322 - S.Kannan V. State, 2017(3) MWN (Cr.) 435 - S.P.Tamilarasan V. State*** are not helpful to the facts of the present case.

***PUBLIC SERVANT***

20.The next point to be considered by this Court is whether the respondent is a public servant or not?

21.Perusal of Section 2(c) (iii) would show that any person in the service or pay of a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956. Now, for the purposes of the present case, it is required to examine as to whether the Clerk holds an office and performs public duty so as to attract the definition of „public servant" under Section 2(b) of the PC Act, 1988 means a duty in the discharge of which the State, the public or the Community at large has an interest. The Co-operative Housing Society is running as per the direction of the Government and the fund was allotted by the Principal Society. Definition 2(26) of Tamil Nadu Co-operative Societies Act, 1983 shows that in respect of receiving assistance from the Government, there is a specific Society available viz., self reliant Society means a registered Society which does not receive assistance in any form from the Government under Chapter VI or from any registered Society receiving such assistance from the Government.

22.Perusal of the evidence of P.W.5 would indicate that the Government has not any share capital from the Co-operative Societies and the salary was disbursed from the fund of the Society and not paid by the Government. Perusal of the evidence of P.W.1, who issued sanction to prosecute the accused would shows that for the purpose of granting loan, the fund was allotted by Principal Society and the loan was sanctioned from the Government, in which the Government is guarantor. When the loan application was sent to the Principal Society, the Principal Society would consider the loan application and sanction the loan amount. P.W.5 also admitted that they received assistance from the Principal Society and as per the direction of the Government, the loan was sanctioned in favour of the beneficiaries. However, there is no contra evidence that they did not receive any aid from the Government.

23.Furthermore, the Hon'ble Apex Court in the case of ***CBI Vs, P.G.Jain reported in (2016) 12 Supreme Court Cases 360***, has held as follows:

> “7.Notwithstanding the above, we have noticed a different dimension to the issue before us. The question whether the respondent-accused is a public servant has to be further considered in the context of the definition of “public servant” appearing in Section 2(c) of the PC Act, 1988. Sub clauses (iii) and (ix) of Section 2(c) of the PC Act, 1988 would be relevant and are, therefore, extracted below:
>
> “(c) "public servant" means-
>
> (i) – (ii) * * *
>
> (iii) any person in the service or pay of a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956;
>
> (iv) – (viii) * * *
>
> (ix) any person who is the president, secretary or other office-bearer of a registered co-operative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or a State Government or from any corporation established by or under a Central, Provincial or State Act, or any authority or body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956;”
>
> 8.Insofar as Section 2(c)(ix) is concerned, though it deals with cooperative societies the reference therein is in respect of the President, Secretary or other office-bearers of a cooperative society whereas in the present case the respondent-accused is an employee of the cooperative society. The question, therefore,

that has to be considered is; whether the respondent-accused would come within the ambit of the definition contained in Section 2(c)(iii) of the PC Act, 1988?

9.In this regard, we may notice a decision of this Court in State of A.P. v. P.Venku Reddy wherein a view has been taken that though an employee of a cooperative society may not come within the ambit of the definition of "public servant" under Section 2(c)(ix) of the PC Act, 1988 yet such a person may be a "public servant" within the meaning of Section 2(c)((iii) of the PC Act, 1988 provided the cooperative society is owned, controlled or aided by the Government. In this context in State of A.P. V. P.Venku Reddy, this Court has also observed the necessity to consider a purposive interpretation of the definition of "public servant" having regard to the changes brought in by the PC Act, 1988 in contradistinction to the definition of "public servant" under the Prevention of Corruption Act, 1947. It is the aforesaid aspect of the matter that the attention of the Court will now have to turn to.

The above decision is directly covered to the case of the present case.

24.Further, the Hon'ble Apex Court in the case of ***CBI V. Ramesh Gelli reported in (2016) 3 Supreme Court Cases 788***, has held as follows:

"35.In P.V.Narasimha Rao V. State (SCC p.684, para 61) the meaning of the expression "office" appearing in the relevant provision of the PC Act has been understood as "a position or place to which certain duties are attached, especially one of a more or less public character". Following the views expressed by Lord Atking in Mc Millan V. Guest, this Court had approved the meaning of the expression "office" to be referable to a position which has existence independent of the person who fils up the same and which is required to be filled up in succession by successive holders.

36.While there can be no manner of doubt that in the objects and Reasons stated for enhancement of the Prevention of Corruption Act, 1988 it has been made more than clear that the Act, inter alia, envisages widening of the scope of the definition of "public servant", nevertheless, the mere performance of public duties by the holder of any office cannot bring the incumbent within the meaning of the expression "public servant" as contained in Section 2(c) of the PC Act. The broad definition of "public duty" contained in Section 2(b) would be capable of encompassing any duty attached to any office inasmuch as in the contemporary scenario there is hardly any office whose duties cannot, in the last resort, be traced to having a bearing on public interest or the interest of the community at large. Such a wide understanding of the definition of "public servant" may have the effect of obliterating all distinctions between the holder of a private office or a public office which, in my considered view, ought to be maintained. Therefore, according to me, it would be more reasonable to understand the expression "public servant" by reference to the office and the duties performed in connection therewith to be of a public character."

25.Considering the above said decisions, the judgment relied on by the learned counsel for the respondent in ***(2002) 7 Supreme Court Cases 636 – State of Maharastra V. Prabhakarrao*** is not applicable to the facts of the present case. A perusal of the decision referred to above, the Apex Court has held that under clause (iii) of Section 2(c), any person in the service or pay of a corporation established by or under a Central, Provincial or State Act or an authority or a body owned or controlled or aided by the Government and thereby held that it has be ascertained whether the accused in that case comes within the purview of the aforementioned clauses or any other clause of Section 2(c) of the Prevention of Corruption Act, 1988 and remitted the matter back to the trial Court for determination of the question, enquiry into facts, relating to the management, control and funding of the society, is necessary to be ascertained. Therefore, the said decision is not applicable to the present case, as in the present case, the fund was allotted by the Government to the Housing Society. Therefore, this Court is of the view that the employees of the Co-operative Housing Society come within the purview of "public servant'.

***DELAY IN SANCTION AND FOLLOWING OF DVAC MANUAL***

26.Now, this Court has to decide whether the delay in sanction and not following the DVAC manual are vitiated the entire prosecution or not?

27.In respect of issuance of sanction to prosecute against the accused, P.W.1, the Superintendent of Joint Registrar of Co-operative Societies, who issued sanction order Ex.P1. In his evidence, he has deposed that he received the letter from DVAC office for getting to prosecute the accused for the offence under Prevention of Corruption Act and after perused the documents annexed with the letter and since he himself satisfied, he issued Ex.P1 sanction order dated 17.05.2004 to prosecute against the accused. In his evidence, he admitted that the accused was working as Clerk in the Housing Society. On perusal of the entire records would reveals that the sanctioning authority issued the sanction order after applying his mind and after perusing all the materials, he issued the same. Though the learned counsel appearing for the respondent would submit that the delay in obtaining the sanction order and non compliance of Para 47 is vitiated the entire prosecution, in the decision of this Court reported in ***K.Selvaraj V. State - 2004 Cri.L.J.3754***, this Court has held that the administrative guidelines issued by the Vigilance Manual is only directory and not mandatory and it is to be noted that the expression used in Para 47 is only .... preferably .....” and hence, the contention urged on the non-compliance of Para 47 does not in anyway undermine the reliability of the witness particularly when it is not shown in what respect he has obliged the Vigilance officials or that any prejudice being caused to the accused and any omission on the part of investigating officers to strictly comply with those administrative guidelines would not in anyway vitiate the trap. The relevant portion of the said said decision is extracted as under:

> “44.Laying emphasis upon Rule 41, it is contended that in the instant case, Rule 41 is not complied with and the non-compliance of Rule 41 vitiates the trap. Evidence of P.W.2 is assailed on the ground that being a Junior Assistant, lower in tank, and he is only an obliging witness to the Vigilance Officials. Taking the assistance of a public servant, who is lesser in rank than the officer to be trapped, might be non-compliance of Rule 41; but in my view, it does not in any way vitiate the trap. The administrative guidelines issued by the Vigilance Manual is only directory and non mandator. It is also to be noted that the expression unsed in Rule 41 is only ..... preferably.....” The contention urged on the non-compliance of Rule 41 does not in any way undermine the reliability of P.W.2 particularly when it is not shown in what respect he has obliged the Vigilance officials or that any prejudice being caused to the 1st accused.
>
> 45.The guidelines given as per the Vigilance Manual are only directory and administrative directions. Any omission on the part of investigating officers to strictly comply with those administrative guidelines would not in anyway vitiate the trap. In 2002(1) Mad.LW (Crl.) 136 : (2001 Cri L J 4139), Justice M.Karpagavinayagam while dismissing the Criminal Original Petition filed for quashing the proceedings, has also observed that Rules under Vigilance Manual are only administrative and on non-observance of the same there is no mandatory violation, which would affect the validity of the prosecution.”

28.The Hon'ble Apex Court in the case of ***State of M.P. V. Ram Singh reported in (2000) 5 Supreme Court Cases 88***, has held that procedural delays and technicalities of law should not be permitted to defeat the object sought to be achieved by the Act. The overall public interest and the social object is required to be kept in mind while interpreting various provisions of the Act and deciding cases under it.

29.Even on a perusal of the decision relied upon by the learned counsel for the respondent/accused in ***K.V.Joseph V. State of Gujarat reported in 1997 CRI.L.J. 2896***, the Gujarat High Court makes it clear that if a non violation of the DVAC manual, the State Government have departmental proceedings for dereliction of duty and it will not vitiate the entire prosecution case. The above decision was followed by the decision this Court in A.Selvaraj Vs. State in Crl.A.No.605 of 2016 dated 19.06.2018. Further, in the above said case, this Court has held that the non-recording of the statement from the accused after the trap proceeding is not fatal to the case of the prosecution and only the disciplinary proceeding alone can be taken against the officer concerned. Therefore, the decisions relied on by the learned counsel appearing for the respondent/accused are not applicable to the facts of the present case and this Court is of the view that the the ground of non-recording of the statement of the accused is not vitiated the case of prosecution.

30.In the light of the above discussions, this Court holds that the prosecution has proved the charges against the accused through valid and reliable evidence. The trial Court has not properly appreciated the evidence and hence, the findings of the trial Court is perverse and needs interference of this Court. Accordingly, the judgment of acquittal is liable to be set aside.

31.In the result, the judgment of acquittal passed by the Special Judge for Prevention of Corruption Act Cases, Madurai in Spl.C.C.No.132 of 2011 dated 28.05.2013 is set aside. The accused is found guilty for the offence under Section 7 and 13(1)(a) & (d) r/w 13(2) of Prevention of Corruption Act, 1988 and sentenced him to undergo rigorous imprisonment for one year (three counts) and also pay a fine of Rs.2,500/- for each count and in default of payment of fine, the accused shall undergo simple imprisonment for 3 months each for the above said offence. The sentence imposed on the accused shall run concurrently. The trial Court is directed to take steps to secure the accused for undergoing the remaining period of sentence. However, liberty is granted to the accused to surrender before the trial Court, within a period of four weeks from the date of receipt of a copy of this order.

Sd/-

Assistant Registrar

// True Copy //

Sub Assistant Registrar(CS)

To

1.The Special Judge for Trial of Prevention of Corruption Act Cases,
Madurai.

2.The Deputy Superintendent of Police,
Vigilance and Anti-Corruption Dept.
Virudhunagar.

3.The Inspector of Police,
Department of Vigilance and Anti Corruption,
Virudhunagar.

4.The Chief Judicial Magistrate, Srivilliputhur.

5.The Additional Public Prosecutor
Madurai Bench of Madras High Court
Madurai.

6.The Record Keeper,
Criminal Section,
Madurai Bench of Madras High Court, Madurai.(2 copies)

7.The Superintendent of Police,Virudhunagar District.

+1cc to Mr.G.MARIAPPAN, Advocate, SR.No. 61063

**Criminal Appeal(MD) No.104 of 2014**
**15.04.2019**

**Arul**
**KK/SAR/29.04.2019/ 22P- 10C**