BAIL SLIP

S.Vaithiyalingam, S/o.K.Somasundaram, aged about 53 years , Sole Accused was released on Bail (accuse not in Jail) vide order of this Court dated 17.04.2013 in MP(MD)No.1 of 2013.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

CRL.A.(MD)No.127 of 2013

S.Vaithiyalingam ... Appellant / Sole Accused

-Vs-

State Represented through
Deputy Superintendent of Police,
CBI/ACB:Chennai,
(RC MAI 2010 A 0040) ... Respondent / Complainant

PRAYER: Criminal Appeal filed under Section 374 of the Criminal Procedure Code, praying to set aside the judgment and sentence passed by the learned II Additional District Judge for CBI Cases, Madurai in C.C.No.1 of 2011, dated 08.04.2013.

For Appellant : Mr.J.Selvam
For Respondent: Mr.N.Nagendran
Special Public Prosecutor.

JUDGMENT

This Criminal Appeal is directed against the judgment and sentence passed by the learned II Additional District Judge for CBI Cases, Madurai in C.C.No.1 of 2011, dated 08.04.2013, wherein the accused was convicted for the offences under Sections 7 and 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988 (hereinafter referred as 'the Act') and sentenced to undergo two years rigorous imprisonment and imposed to pay a fine of Rs.2,000/- in default to undergo six months rigorous imprisonment for the offence under Section 7 of the Act and sentenced to undergo two years rigorous imprisonment and imposed to pay a fine of Rs.2,000/- in default to undergo six months rigorous imprisonment for the offence under Section 13(2) r/w 13(1)(d) of the Act. The above sentences shall run concurrently.

2.For the sake of convenience, the parties are referred to as per the rank in the trial Court.

3.The brief facts, which are leading to this case, are as follows:-

(i) The accused by name Vaithiyalingam, was working as Notice Server in the office of Additional Commissioner of Income-Tax Department, Range-II, Madurai. The defacto complainant was working as Content Provider for Reliance Communications Limited. The Reliance Communications Limited, Mumbai had deducted income tax at his source and forwarded the TDS to National Security Depository Limited from time to time. During the financial year 2008-09 (A.Y.2009-10), the Reliance Communications Limited, deducted TDS of Rs.47,898/- from his income at source and issued TDS certificate for Rs.43,749/- vide Form No.16A. On 14.09.2009, the defacto complainant P.W.8 on his individual capacity filed income tax return for the assessment year 2009-2010. As per the income tax return filed by the defacto complainant, a refund of Rs.43,749/- was due to him. The said income tax return was received by the accused vide receipt No.0211003150. That receipt is marked as Ex.P.5.

(ii)Thereafter, the accused made an endorsement at the top of the front page of the income tax return of the defacto complainant as "R.Rs.43,749/-", which indicates that the income tax return filed by the defacto complainant falls under the category of refund and the refund due for the assessee is Rs.43,749/-. Thereafter, the accused made entries in return receipt register for the assessment year 2009-2010 maintained at the office of the Income Tax Officer, Ward II(1), Madurai, for showing the receipt of income tax returns from the assessese. The income tax return filed by the defacto complainant was entered in the return receipt register against Serial No.3150, dated 14.09.2010 and the same was processed by the Senior Tax Assistant P.W.2 on out of turn basis on the request of the accused.

(iii)During the process, it was found out that the defacto complainant was eligible for a refund of Rs.47,460/- including interest and the same was informed to the accused by the Senior Tax Assistant P.W.2. Thereafter, the accused contacted the defacto complainant over phone and informed the same and requested to meet him on 25.10.2010. At that time, the accused informed him that the income tax return filed by him was already processed and he was eligible to get a refund of Rs.47,000/- including interest and demanded bribe of Rs.4,000/- from the defacto complainant for releasing the eligible refund amount and the accused also informed that the demanded bribe of Rs.4,000/- to be paid to him on 01.11.2010 at his office viz., Range II, Madurai.

(iv)Since the defacto complainant did not want to pay the bribe amount, he made a complaint before P.W.7 on 26.10.2010 in his office and in turn, he informed that he is not a competent person, since the accused person is the Central Government employee. He instructed the defacto complainant to file a complaint before CBI. Therefore, the defacto complainant made a complaint before the Superintendent of Police, CBI:ACB, Chennai on 01.11.2010. Thereafter, P.W.11 registered the case and arranged for official witnesses and conducted pre-trap proceeding. He also prepared entrustment mahazar under Ex.P.17. Thereafter, P.W.11 trap laying officer went along with P.W.8 defacto complainant, P.W.10 official witness and his team to the office of the accused. P.W.8 and P.W.10

proceeded in the office and all the other trap team members were watching this. P.W.8 enquired the accused about the refund of TDS, which was due for him, in the presence of P.W.10. The accused took out the file from the custody of P.W.2 after obtaining oral permission from him and informed the defacto complainant that his refund of TDS was already processed and also shown the calculation of refund of TDS made in the file and the accused further informed the complainant that the income tax department was observing "Vigilance Awareness Week" and requested the complainant to wait alone near EPF office, Narimedu, Madurai. Accordingly, P.W.8 and P.W.10 proceeded with the car of the defacto complainant to EPF office and other team members followed them. Thereafter, P.W.10 alighted from the car and wait in front of petty shop situated in the corner of the EPF office nearly 60 feet distance. The defacto complainant parked his car near the EPF office and the other team members took their positions near the EPF office and waited there. Subsequently, the accused came there in TVS XL Vehicle and accepted the demanded amount of Rs.4,000/-. Thereafter, the defacto complainant gave pre-arranged signal by combing his hair with both the hands. Subsequently, the accused was caught red handed on 01.11.2010 near EPF office, Narimedu, Madurai.

(v)As it was a road side, the trap team members along with the accused proceeded to nearby EPF office and met one Pandian, Assistant Provident Fund Commissioner, who is examined as P.W.6 and requested him to provide a room for a secret operation. Thereafter, P.W.11 directed the Constable to prepare fresh sodium carbonate solution in a clean glass tumbler and he did so. Then, he instructed the accused to dip his fingers into the said solution and the same was turned into pink and his shirt also subjected to sodium carbonate solution. P.W.11 enquired about the bribe amount and the accused replied that he has kept the bribe amount in his left hand side shirt pocket and handed over the same to P.W.11. The tainted currency notes numbers were found tallied with the entrustment mahazar. The detailed procedure followed in this regard are elaborately recorded in the form of entrustment mahazar and recovery mahazar and the same were duly signed by P.W.10. The resultant solutions were collected and forwarded to expert opinion.

(vi)P.W.12 another Inspector of Police, CBI:ACB, Chennai took up the case for investigation and after completing investigation, filed final report before the trial Court against the accused.

4.After perusal of the records, the trial Court framed charges against the accused for the offences under Sections 7 and 13 (2) r/w 13(1)(d) of the Act.

5.In order to prove the charges, the prosecution has examined 12 witnesses as P.W.1 to P.W.12 and marked 24 documents as Exs.P.1 to P.24 and also material objects M.O.1 to M.O.6. However, the accused did not examine any witness and mark any documents.

6.On consideration of both oral and documentary evidence, the trial Court has found that the demand of illegal bribe is proved by the evidence of P.W.8, 10 and 11 and convicted the accused for the offences under Sections 7 and 13(2) r/w 13(1)(d) of the Act and sentenced him as stated supra.

7.Aggrieved against the same, the accused has preferred this Criminal Appeal.

8.The learned counsel appearing for the appellant would submit that the appellant did not commit any offence as alleged by the prosecution. In fact, Ex.P.16 complaint and the evidence of P.W.8 is totally contrary in nature. P.W.8 in his evidence stated that the alleged demand was made on 25.10.2010. However, he made a complaint only on 01.11.2010 and there is no proper explanation for delay in filing the complaint, which creates suspicious over the complaint made by P.W.8. Further, the appellant is not the competent person to release the refund TDS amount in favour of P.W.8 and when a person is not competent to refund the TDS amount, the allegation with regard to the demand and acceptance is unsustainable one. Therefore, the demand and acceptance is not proved in the manner known to law and in fact, P.W.8 is accomplish witness and except P.W.8 no other witnesses are available in order to prove the demand. In the absence of demand, mere acceptance of the bribe amount will not constitute an offence under Section 13(1)(d) of the Act. However, the trial Court proceeded the entire case, as if the demand was proved and the acceptance was also established by the prosecution. In fact the evidence of P.W.8 and P.W.10 is totally contrary in nature. There is no corroboration in between P.W.8 and P.W.10. In the absence of corroboration, benefit of doubt should be given to the accused. Accordingly, he prayed for acquittal.

9.In support of his contention, he placed reliance on the decisions of the Hon'ble Apex Court reported in ***(2010) 3 MLJ (Crl) 182 (P.Meganathan Vs. State of Tamil Nadu), 2006 Crl.L.J. 518 (State Vs. K.Narasimhachary), AIR 2016 SCC 298 (Krishnan Chander Vs. State of Delgi)*** and ***(2016) 12 SCC 150 (V.Sejappa Vs. State by Police Inspector Lokayukta, Chitradurga).***

10.Per contra, the learned Special Public Prosecutor appearing for the respondent would submit that admittedly, the appellant was working as Notice Server in Income Tax Department. P.W.2, who was working as Senior Tax Assistant is the competent person to process the income tax refund orders. P.W.3 and P.W.4 are the Income Tax Officials and they are the authorities to sanction the refund order. Their evidence clearly deposed that the accused wrote the refund amount as Rs.43,749/- in Ex.P.7 by red ink. Ex.P.3 is income tax returns filed by P.W.8 for the assessment year 2009-2010. Ex.P.7 is the endorsement made by the accused and P.W.2 in his evidence stated that he wrote as Rs.43,749/- in the first paper of Ex.P.3 series. Ex.P.8 endorsement made by P.W.2 at the request of the accused. The evidence of P.W.2 and P.W.3 clearly corroborated. The appellant is interested to release the refund in favour of the defacto complainant. For that purpose, he approached the defacto complainant and demanded a sum of Rs.4,000/- from P.W.8. The initial demand made on 25.10.2010 and thereafter, he approached P.W.7 and thereafter, he filed a complaint Ex.P.16 on 01.11.2010 and the delay is properly explained by P.W.8 in his evidence itself. Hence, the argument of the learned counsel is not correct.

11.He would further submit that the first demand made on 25.10.2010, thereafter, the second demand made at the time of trap on 01.11.2010 in the presence of P.W.10. P.W.10 clearly deposed in his evidence that P.W.8 and P.W.10 met the accused. At that time, P.W.8 enquired about the refund amount. The accused in code words asked whether he has brought, P.W.8 replied that yes. After the exchange of code words, the accused officer directed P.W.8 to wait in front of EPF office, thereafter, he accepted the bribe amount in his car in front of EPF office. Though P.W.10 shadow witness has not accompanied with P.W.8 at the time of accepting the amount, he watched the same in front of petty shop situated in the corner of the EPF office nearly 60 feet distance. Hence, the first and second demand made on 25.10.2010 and 01.11.2010 respectively, clearly established by the prosecution and the acceptance also proved by the recovery mahazar and the prosecution has discharged the initial burden under Section 20 of the Act with regard to the demand and acceptance. Thereafter, it is for the accused to disprove the presumption. Here, for the purpose of disproving the prosecution, the accused did not examine any witness and mark any documents. In the absence of proper explanation, it is presumed that the accused demanded bribe amount for processing the refund in favour of P.W.8 and accepted the same. For receiving illegal gratification, a person need not be a competent. In the present case, the appellant is working as Notice Server in the Income Tax Department and he made endorsement in Ex.P.3 series. Hence, the prosecution established the case beyond reasonable doubt. Accordingly, the well considered judgment passed by the trial Court need not be interfered with without any valid reason. Hence, he prayed for acquittal.

12.Heard both sides and perused the materials available on record carefully.

13.Upon careful consideration, re-assessment of the evidence and other materials on record and in the light of the above submissions, now it has to be analysed that:-

(i) whether the complaint is filed with delay of 7 days and if it is so, the delay is explained or not;

(ii) whether the delay in filing the complaint and the person is not a competent to refund will vitiate the prosecution case or not;

(iii) whether the trial Court was right in finding the appellant / accused guilt under Section 7 and 13(2) r/w 13(1)(d) of the Act;

(iv)whether the conviction and sentence passed by the trial Court is warranting any interference.

14.On perusal of the entire records, it is seen that P.W.1, who was working as Additional Commissioner, Income Tax Department, is the sanctioning authority and sanctioned the prosecution against the accused, which is marked as Ex.P.1. The accused did not attack the sanction of the prosecution. P.W.1 in his evidence deposed that he is the competent person to sanction the prosecution against Group-C servant. P.W.2 to P.W.5 are income tax officials. They deposed that the accused made demand for the purpose of processing the application for refund in favour of P.W.8. P.W.6, who the Assistant Provident Fund Commissioner, deposed that trap proceedings was conducted in the presence of him in his office and as well as he deposed that he allotted the room for the purpose of completing the trap proceedings. P.W.7 Inspector of Police in his evidence deposed that he initially received an information from P.W.8 and thereafter, he instructed P.W.8 to approach the competent authority viz., CBI. P.W.12 is the investigating officer, who conducted investigation.

15.In the present case, the crucial witnesses are P.W.8 to P.W.11. P.W.8 is the defacto complainant, P.W.9 is the Scientific Officer, who examined for the purpose of proving phenolphthalein test, P.W.10 is the shadow witness, who accompanied with the defacto complainant and P.W.11 is the trap laying officer, who explained the trap proceedings happened on 01.11.2010.

16.P.W.8 in his evidence deposed that he filed income tax return for the assessment year 2009-2010 and the accused contacted P.W.8 over phone on 22.10.2010 and he want to meet on 25.10.2010 in the income tax office. At that time, the accused has shown Ex.P.8 refund amount and demanded 10% of the refund amount i.e., Rs.4,000/-. Since P.W.8 is not willing to give bribe amount, he decided to launch prosecution on 26.10.2010 accordingly, he met P.W.7, who in turn instructed to approach the concerned authority, since the accused is the Central Government employee. Accordingly, he made a complaint on 01.11.2010 before P.W.11 trap laying officer and after observing the formalities, P.W.8 accompanied with P.W.10 in his car and proceeded to the income tax office and P.W.8 and P.W.10 met the accused in the income tax office and enquired about the TDS refund amount in the presence of P.W.10. The accused asked in the code words whether he has brought and the defacto complainant said yes. P.W.10 understood the conversation in between P.W.8 and the accused officer, thereafter, the accused requested P.W.8 to wait alone in front of the EPF office. Thereafter, P.W.10 alighted from the car and wait in front of petty shop situated in the corner of the EPF office nearly 60 feet distance.

17.P.W.10 shadow witness deposed in his evidence that he accompanied with the defacto complainant P.W.8 and met the accused officer. On seeing them, the accused officer enquired the defacto complainant in code words, whether he has brought and the defacto complainant replied that yes he gave. After exchange of code words, the accused informed the complainant that the income tax department was observing "Vigilance Awareness Week" and requested the complainant to wait alone near EPF office, Narimedu, Madurai. When they came out, P.W.8 defacto complainant informed that since the shadow witness P.W.10 is stranger to the accused officer, he hesitated to receive the bribe amount. Thereafter, P.W.10 alighted from the car and he was waiting in the petty shop situated in the corner of EPF Office nearly 60 feet distance. He further deposed that he has seen the accused officer, while receiving phenolphthalein coated money from the defacto complainant. Thereafter, P.W.8 gave pre-arranged signal and thereafter, the accused was secured after completion of the trap proceedings. During the trap proceedings, the fingers of the accused dipped in the sodium carbonate solution and the tainted currency notes were compared with the entrustment mahazar and the numbers were tallied and thereby, subjected for phenolphthalein test and marked. Thereafter, the trap laying officer forwarded the materials for expert opinion to P.W.9.

18.P.W.9 Scientific Officer has proved the phenolphthalein test conducted by the trap laying officer and issued Ex.P.19. The evidence of P.W.8, 9, 10 and 11 clearly corroborated each other. Hence, the prosecution has established the guilty of the accused beyond reasonable doubt with regard to the demand and acceptance.

19.Now it is necessarily discussed whether the decision reported in ***(2010) 3 MLJ (Crl) 182 (P.Meganathan Vs. State of Tamil Nadu),*** relied by the learned counsel for the appellant is applicable to the present case on hand, in respect of delay in filing the complaint, wherein the Principal Seat of this Court clearly held that the delay in filing the complaint is one of the ground for deciding the appeal and if the delay is not properly explained, it creates suspicious over the complainant. In the present case, admittedly, the accused contacted the defacto complainant over phone on 22.10.2010. However, P.W.8 met the accused on 25.10.2010 and thereafter, he made oral complaint before P.W.7 on 26.10.2010 and he instructed the defacto complainant to approach the CBI authority, since the accused is the Central Government employee and thereafter, he lodged the complaint on 01.11.2010. Therefore, the prosecution has clearly explained the delay in filing the complaint. Hence, the decision referred above by the learned counsel for the appellant is not applicable to the present case on hand.

20.Next point that was raised by the learned counsel for the appellant is that the appellant is not a competent person to refund the amount. However, in the present case, the appellant is working as Notice Server. On perusal of the evidence of P.W.8, he did not depose that the accused officer is competent person to disburse the refund amount and he clearly deposed that the accused informed P.W.8

that the refund amount was processed and it is ready for disbursement and for the purpose of early disbursement, he offered Rs.4,000/- as illegal gratification from P.W.8. Accordingly, the said amount was accepted on 01.11.2010 at the time of trap proceeding. Hence, for receiving the bribe amount, the person need not be a competent person and his official status is sufficient to demand the bribe amount. Hence, the decision reported in 2006 Crl.L.J. 518 referred above relied upon by the learned counsel for the appellant is not applicable to the present case on hand. In that case, the prosecution did not establish that the accused therein is responsible for issuance of certificate. Further, there is an enmity in between the accused and the complainant. In that background, the facts of the said case are completely different from the present case on hand.

21.The last contention raised by the learned counsel for the appellant is mere recovery of the tainted money is not sufficient to convict the accused, when the substantial evidence is not reliable. In this regard, he relied upon the decision (2016) 12 SCC 150 referred above, wherein it has been held that mere recovery by itself cannot prove the charge of the prosecution against the accused, in the absence of any evidence to prove the payment of bribe or to show that the accused voluntarily accepted the bribe knowing it to be bribe. However, in the present case, the first demand made on 25.10.2010 and thereafter, the second demand in the presence of P.W.10 made on 01.11.2010. Thereafter, he accepted the bribe amount and the acceptance is clearly proved by conducting phenolphthalein test and examining P.W.9 Scientific Officer and they clearly corroborated each other. Hence, the prosecution has clearly proved the case with regard to the demand and acceptance of the bribe amount. Hence, the decision reported in (2016) 12 SCC 150 referred above relied by the learned counsel for the appellant is not applicable to the present case on hand.

22.However, it is relevant to refer the decision of the Hon'ble Apex Court rendered in the case ***M.Narsinga Rao Vs. State of Andhra Pradesh*** reported in ***(2001) 1 SCC 691,*** wherein it has clearly been held as follows:-

> *"18.For the purpose of reaching one conclusion the Court can rely on a factual presumption. Unless the presumption is disproved or dispelled or rebutted, the Court can treat the presumption as tantamounting to proof. However, as a caution of prudence we have to observe that it may be unsafe to use that presumption to draw yet another discretionary presumption unless there is a statutory complusion. This Court has indicated so in Suresh Budharmal Kalani Vs. State of Maharashtra MANU/SC/0608/1998: 1998 Cri.L.J.4592. "A presumption can be drawn only from facts-and not from other presumptions-by a process of probable and logical reasoning".*

23.In the present case, P.W.8 and P.W.10 clearly corroborated each other, besides, their evidences also proved that the accused has received illegal gratification from P.W.8 other than legal remuneration.

24.On perusal of the evidence of P.W.8 to P.W.11, there was clear demand and acceptance of the bribe by the accused and hence, I have no hesitation to hold that the prosecution has established that the accused discharging his official duty demanded and accepted the bribe of Rs.4,000/- as illegal gratification from P.W.8.

25.In such circumstances, the learned counsel for the appellant would submit that the appellant is now 60 years old and he is suffering from age old ailments. Hence, he requests that some leniency may be shown in the sentence awarded by the trial Court.

26.The learned Special Public Prosecutor has no objection for reducing to minimum sentence.

27.On perusal of the entire evidence available on record, I do not find any error in the judgment passed by the trial Court. Therefore, this Court is inclined to confirm the judgment passed by the learned II Additional District Judge for CBI Cases, Madurai in C.C.No.1 of 2011, dated 08.04.2013. However, considering the age of the appellant and age related ailments as submitted by his counsel, during the course of arguments, this Court while confirming the conviction, reduces the sentence imposed on the appellant from two years to minimum sentence of one year for the offence under Section 7 and from two years to minimum sentence of one year for the offence under Section 13(2) r/w 13(1)d) of the Act. Both the sentences are ordered to run concurrently. The period of incarceration already undergone by the appellant shall be given set off under Section 428 Cr.P.C. The trial Court is directed to take immediate steps for securing the accused / appellant and commit him to prison to undergo the remaining period of sentence modified by this Court. The bail bond, if any, executed by the appellant / accused stands cancelled.

28.In the result, this Criminal Appeal is partly allowed to the extent as indicated above.

Sd/-

Assistant Registrar

// True Copy //

Sub Assistant Registrar(CS)

Myr

To
1.The II Additional District Judge for CBI Cases,
Madurai.

2.The Deputy Superintendent of Police,
CBI/ACB:Chennai.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Copy To:

The Section Officer,
Criminal Section,
Madurai Bench of Madras High Court,
Madurai.**(2 copies)**

1 CC to M/s.J.SELVAM, Advocate (SR-55212[F] dated 20/03/2019)

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19.03.2019

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