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

Reserved on: March 14, 2019
Pronounced on: March 29, 2019

\+ **CRL.A. 698/2014**

SANJAY KUMAR SINGH ..... Appellant

Through: Mr. Harsh Kumar Sharma & Ms. Vaibhavi Sharma, Advocates

Versus

C B I ..... Respondent

Through: Mr. Sanjeev Bhandari, Special Public Prosecutor with Mr. Prateek Kumar, Advocate

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

ORDER

Impugned judgment of 22nd May, 2014 holds appellant and his co-accused *Hari Chand* and *Subhash Narain* guilty of the offence under Section 120B IPC r/w Section 7 of *Prevention of Corruption Act, 1988 (hereinafter referred to as the PC Act)* and also for the offence under Section 13(1) (d) of PC Act. Vide order of 23rd May, 2014, appellant and his co-accused have been sentenced to rigorous imprisonment for four years with fine of ₹1,00,000/- with default clause for the offence under Section 120B IPC and similar sentence has been awarded to appellant and his co-accused for offence under Section 7 of PC Act. For the offence under Section 13(2) r/w Section 13(1) (d) of PC Act, appellant and his co-accused have been sentenced to rigorous imprisonment for three years and fine of ₹50,000/- each with default clause. The aforesaid sentences have been made to run concurrently by the trial court.

Appellant was posted as Superintendent and his co-accused *Hari Chand* was posted as Inspector, whereas accused *Subhash Narin* was posted as Assistant Commissioner in Central Excise, Ministry of Finance, Division VIII, Scope Minar, Laxmi Nagar, Delhi. The factual background of this case, as noticed by the trial court in the impugned judgment, is as under:-

> *"3. Briefly stating, the facts of the case are that a written complaint dated 31.12.2017, Ex. PW1/D was made by Sushil Kumar Jain (PW1) (hereinafter shall be referred as complainant) to the CBI to the effect that he was looking after the entire business affairs and was also an authorized signatory of J.V. Industries (P) Ltd. where they used to run a copper manufacturing plant. On 19.12.2007, a team of anti Evasion Cell of Central Excise conducted a search at the premises of J.V. Industries and some records were seized. It is further mentioned that on 28.12.2007, Mr. Hari Chand, Inspector, Central Excise contacted the complainant on mobile phone and asked to meet him in his office at Laxmi Nagar. The complainant visited there and met Hari Chand who took him to Sanjay Kumar Singh, Superintendent who told that anti evasion cell asked for inspection report. S.K.Singh and Hari Chand told that they could get settled the case of the complainant in anti evasion cell by sending a favourable report. Complainant further mentioned that they demanded Rs.10 lakh as bribe from the complainant for sending favorable report. They threatened the complainant that in case bribe was not paid on 30.12.2007, they would submit report against the factory. In the morning of 31.12.2007, Hari Chand called on the mobile phone of the complainant and asked the reason for not paying the bribe on 30.12.2007. When complainant*

took some excuse, he told that he alongwith S.K.Singh would come to the factory in the afternoon to conduct inspection. Hari Chand asked the complainant to join them and to pay them the bribe of Rs.10 lacs in the factory. Since the complainant did not want to pay the bribe, he made complaint to CBI.

4. The complaint Ex.PW1/D was marked to Inspector Rajesh Chahal (PW16). Independent witness Neeraj Jain (PW12) was arranged. Complainant (PW1), his son Manoj Kumar Jain and independent witness were introduced to each other and contents of complaint were explained. One digital voice recorder was arranged. Since, officials of Central Excise were to visit the factory of the complainant in the afternoon of 31.12.2007, it was decided to verify the contents of complaint. Inspector Rajesh Chahal (PW16), complainant, his son and independent witness left for the factory. On the way, a call was received by complainant from accused Hari Chand which was recorded. After few minutes, another call was received from accused Hari Chand which was also recorded. Accused Hari Chand asked the complainant to come to the factory quickly. On reaching the factory, complainant was handed over digital voice recorder, whereas PW14 and independent witness remained outside. After about two hours, complainant came out and informed that accused Hari Chand and Sanjay Kumar Singh came to his factory for inspection and they had demanded bribe of Rs.10 lacs by gesture of fingers. They had asked the complainant to hand over the bribe amount in the evening of 31.12.2007. Thereafter, they reached CBI office. The recording of voice recorded was heard which confirmed demand of bribe by them. On the direction of PW14, complainant called accused Hari Chand on his mobile phone and expressed his inability to arrange the money. Thereafter, accused Hari Chand made a call to complainant and insisted him to hand over the bribe money to him and accused S.K.Singh as they were waiting near Cross River Mall, Karkardooma. Recorded conversation was transferred to audio cassette Ex.P5. Its inlay card is

Ex.P9 and cloth wrapper is Ex.P10. A rough transcription Ex.PW1/M of the said conversation was prepared. Verification proceedings were recorded in verification memo Ex. PW1/E. The complainant informed PW14 that he could arrange only Rs.2.5 lacs. He was asked to come on next day i.e. 01.01.2008.

5. After verification of the demand of bribe, FIR Ex.PW1/N was registered and its investigation was entrusted to Inspector Sandeep Chaudhary (PW15) for laying of trap on 01.01.2008. On 01.01.2008, in CBI office, two independent witnesses, namely, Neeraj Jain (PW12) and Praveen Gupta (PW13) were arranged. A trap team consisting of TLO, Inspector Rajesh Chahal (PW16), Inspector S.C.Bhalla, Inspector Prem Chand, SI Nikhil Malhotra, two independent witnesses, complainant and his son Manoj Kumar Jain was constituted. All were introduced to each other and contents of complaint were explained to all. The complainant (PW1) produced GC notes in the denomination of Rs.1,000/-, Rs.500/- & Rs.100/- totaling to Rs.2.5 lacs. The said GC notes were treated with phenolphthalein powder and a practical demonstration regarding reaction between phenolphthalein powder and sodium carbonate was explained to all the trap party members. Personal search of complainant (PW1) was conducted and he was not allowed to keep anything incriminating except his mobile phone. Said tainted GC notes were wrapped in a newspaper and kept in a handbag. The said handbag was given to the complainant with the direction to hand over the tainted bundle of GC notes to the accused persons on their specific demand. Independent witness Neeraj Jain (PW12) was asked to act as a shadow witness to remain close to the complainant to over hear the conversation and to see the transaction of bribe money. He was also directed to pose himself as driver of the complainant. He was directed to give signal of completion of transaction of bribe by scratching his head with both of his hands or by giving a call/missed call from his mobile phone to the mobile phone of Inspector Rajesh Chahal

(PW16). The other independent witness Praveen Gupta (PW13) and Manoj Kumar Jain, son of the complainant was asked to remain with the members of the trap team.

6. In the digital voice recorder, formal voice of both the independent witnesses were recorded and it was given to the complainant (PW1). It was decided to take position near Cross River Mall, Karkardooma. A handing over memo Ex.PW1/F regarding proceedings conducted in CBI office was prepared. All the members of trap team left for said Mall. At about 10.00 a.m., complainant (PW1) made a call from his mobile phone No.9810050612 to the mobile phone 9999898301 of accused Hari Chand. The conversation which had taken place between them was recorded during which accused Hari Chand told that he along with accused Sanjay Kumar Singh was coming in front of Cross River Mall in about 15 minutes. Car of the complainant was parked in the service lane, in front of gate of Mall, whereas other vehicles were kept a bit far away. Other trap party members took positions on both sides of the Mall.

7. At about 10:00 a.m., one white coloured Maruti Zen car came and stopped at the back side of complainant's car. Accused Hari Chand and S.K.Singh came out of the said car and moved towards the car of the complainant. The complainant came out of the car, had a conversation with both the accused and witness Neeraj Jain remained inside the car. Both the accused demanded bribe from the complainant while they were standing in the service lane. Complainant told that the amount was lying in the car. They decided that accused Hari Chand will go in the car of the complainant to take the bribe money. Accused persons also said that part of the bribe would also be given to accused Subhash Narain, Assistant Commissioner. Thereafter, complainant and accused Hari Chand sat in the car of the complainant; complainant sat on the front seat; accused Hari Chand sat on the rear seat; Neeraj Jain (PW12) started driving the car slowly; accused S.K.Singh moved in Maruti Zen car. On specific demand of bribe by *accused Hari Chand, complainant took out bundle of GC notes from the hand bag and gave it to accused Hari Chand who accepted the same with his both hands and kept the same in his left armpit under his blue coat. Witness Neeraj Jain (PW12) heard the conversation and had seen the transaction of bribe. After taking a round of the mall, car was parked near Maruti Zen car, in front of Zonal Office of transport department. Complainant and both the accused came out of the cars and started conversation. Shadow witness (PW12) made a call from his mobile phone to the phone of Insp. Rajesh Chahal as pre-decided. Immediately, trap team members reached the spot and both the accused were challenged whether they had demanded bribe of Rs.10 lacs and accepted bribe of Rs.2.5 lacs from the complainant. On this, both the accused turned pale. Both the accused were caught from wrists. Digital voice recorder was taken back from the complainant. Independent witness Praveen Gupta (PW13) recovered bribe amount Ex.P8 from the left side armpit of accused Hari Chand."*

It is the case of prosecution that the bribe amount was recovered from co-accused Hari Chand and sample voice of appellant was taken and during investigation, it was sent to CFL. Sh. D.K.Tiwari (PW3) had submitted the report PW3/B regarding the voice sample of appellant. Prosecution has relied upon evidence of seventeen witnesses, which includes evidence of material witnesses. S.K.Jain (PW1) is the complainant; D.K.Tanwar (PW3) is the expert who had examined the voice recording; Praveen Jain (PW9) had accorded sanction for prosecution; Rajesh Kanava (PW10) and Tej Pal Singh (PW11) are the witnesses who had searched the office premises of accused person; Neeraj Jain (PW12) and Praveen Gupta (PW13) are the independent witnesses; DSP Sandeep ChaudHARY (PW15) is the Trap Laying

Officer and DSP Rajesh Chahal (PW16) & Addl. SP Ravi Gambhir (PW17) were the Investigating Officers of the case. Appellant in his statement under Section 313 Cr.P.C. before the trial court, had claimed that he is innocent and has been falsely implicated and had got six witnesses examined in defence. Trial court has relied upon evidence of afore-referred material witnesses to convict and sentence appellant as noted hereinabove.

Learned counsel for appellant assails the impugned conviction and sentence on the ground that Complainant (PW1) has categorically stated that appellant had not demanded any money and independent witness Neeraj Jain (PW12) and D.K.Tanwar (PW3), recovery witness, have not deposed against appellant. It is pointed out by learned counsel for appellant that original Digital Voice Recording (DVR) was not produced before the trial court and as per evidence of D.K.Tanwar (PW3), the sample voice of appellant did not tally with the voice recorded and as per evidence of Complainant (PW1), pre-trap verification Memo (Ex.PW1/E) dated 31st December, 2007, recording was for two hours and it is pointed out that as per evidence of D.K.Tanwar (PW3), the cassette prepared from the voice recording was of 60 minutes and this witness has stated that two hours' recording was copied into single cassette and this reflects selective deletion. It is also submitted that as per evidence of D.K.Tanwar (PW3), if it is so done, then chances of tampering are there. Thus, it is submitted that DVR, as contained in the cassette, is not reliable because it is not accompanied by Certificate under Section 65B of Indian Evidence Act, 1872. It is pointed out that cassette prepared from the DVR, is a secondary evidence, which cannot relied upon. So, it is submitted that prosecution fails to connect appellant for the offence in question and thus, appellant deserves to be acquitted.

On the contrary, learned Special Public Prosecutor for respondent-CBI submits that appellant's presence at the spot gives rise to the presumption under Section 20 of the PC Act, which appellant had failed to rebut. It is pointed out that appellant in his statement under Section 313 Cr.P.C. has stated that preparation of Panchnama (Ex. PW1/A) and another letter dated 20th September, 2007 *(Ex. PW1/B)* and it another copy (Ex.PW1/B-2), is matter of record. It is pointed out that appellant in his statement under Section 313 Cr.P.C. has admitted that production of documents by the Complainant (PW1) is matter of record. Attention of this Court is drawn to questions No.1,2,5 & 12 to submit that appellant has failed to rebut the statutory presumption raised against him under Section 20 of the PC Act. Learned Special Public Prosecutor for respondent-CBI submits that furnishing of certificate under Section 65B of Indian Evidence Act, 1872 is not required in the facts and circumstances of this case. Learned Additional Public Prosecutor for respondent-State also submits that apart from afore-noted voice recording, there is ample evidence on record to prove the case against appellant and that conviction of appellant is borne out from the evidence on record and so, this appeal deserve dismissal.

Upon hearing and on scrutiny of evidence on record, I find that the Complainant (PW1) as well as recovery witness (PW13) have not supported the prosecution case qua appellant. Otherwise also, it is not the prosecution case that appellant had demanded or accepted any bribe. The role of demand and acceptance of bribe is attributed to appellant's co-accused *Hari Chand.* Appellant has been convicted in this case with the aid of Section 120B IPC. Prosecution has relied upon the electronic evidence to do so.

It is the case of prosecution that from the original DVR, a cassette (Q1) was prepared. It has come in the evidence of Complainant (PW1) that when the said cassette (Q1) was played, it was not found to be audible and the original DVR was not produced before the Court. It transpires that in the cassette Q1 and Q2, the voice of appellant is not audible to attribute any role to him and that the electronic evidence led is not accompanied by a certificate under Section 65B of the Indian Evidence Act, 1872. Supreme Court in *Anwar P.V. Vs. P.K.Basheer & ors.* (2014) 10 SCC 473 has categorically reiterated that in the absence of certificate under Section 65B of the Indian Evidence Act, 1872, secondary evidence in electronic mode is not admissible. Since the electronic evidence led by prosecution is not accompanied by certificate under Section 65B of the Indian Evidence Act, 1872, therefore, it has to be excluded from consideration and thereupon, this Court finds that the prosecution is left with the evidence of Complainant (PW-1), who has categorically stated in his evidence that he was told by CBI about appellant being a party to the commission of offence in question and that Complainant (PW1) had not heard or seen appellant talking to his co-accused *Hari Chand*.

It has come in the evidence of Complainant (PW1) that appellant was not spotted by him when inspection of his factory was purportedly done by appellant and his co-accused *Hari Chand* on 31st December, 2007. Even the presence of appellant on the day of inspection is not established from the evidence of Complainant (PW1). Appellant is not required to explain his presence at the spot and so, presumption under Section 20 of the PC Act does not arise. So far as the so called admissions made by appellant in his statement under Section 313 Cr.P.C., as pointed out by learned Special Public Prosecutor for CBI, are concerned, I find that these admissions do not incriminate appellant in any manner whatsoever. Moreover, prosecution has to stand on its own legs and cannot base its case on so called inconsequential admissions of appellant-accused in his statement under Section 313 Cr.P.C. In the absence of primary evidence i.e. DVR, the secondary evidence i.e. the cassette in question, cannot be relied upon as prosecution's Voice Identification Expert witness D.K.Tanwar (PW-3) has admitted in his evidence that the chances of tampering are there.

Absence of demand of bribe in a trap case is fatal to the prosecution. Supreme Court in *B. Jayaraj Vs. State of Andhra Pradesh* (2014) 13 SCC 55 and *P. Satyanarayana Murthy Vs. District Inspector of Police, State of Andhra Pradesh and Anr.* (2015) 10 SCC 152 has reiterated that in the absence of proof of demand of illegal gratification, the offence under Section 7 of PC Act does not stand proved, as acceptance of illegal gratification is also required to be proved by reliable evidence. In the instant case, appellant has been convicted with the aid of Section 120B IPC while relying upon the electronic evidence, which has been found by me to be inadmissible in light of afore-going narration. The ingredients of offence of criminal conspiracy, as re-capitulated by Supreme Court in *State v. Anup Kumar Srivastava*, (2017) 15 SCC 560 are as under**:-**

> ***"26.*** *Similarly, the law on the issue emerges to the effect that conspiracy is an agreement between two or more persons to do an illegal act or an act which is not illegal by illegal means. The object behind the conspiracy is to achieve the ultimate aim of conspiracy. For a charge of conspiracy means knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or services in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do."*

Upon testing the prosecution case on the afore-referred parameters, I find that the prosecution has miserably failed to prove that appellant had conspired with his co-accused to commit the offence in question. In view of afore-going narration, this Court is of the considered opinion that the conviction of appellant is unsustainable.

Accordingly, impugned judgment and order on sentence qua appellant is hereby set aside with the rider that any observation made herein, would not impact the conviction of co-accused *Hari Chand.*

With aforesaid rider, this appeal is accordingly disposed of.

(SUNIL GAUR)
JUDGE

MARCH 29, 2019
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