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

% *Decided on: 19.05.2020*

\+ **<u>W.P.(CRL) 3446/2017</u>**

SANDEEP ..... Petitioner

Through: Mr. Salman Khurshid, Sr. Adv. with Mr. Girdhar Govind, Mr. Mukesh Bhardwaj, Mr. Baljinder Singh, Ms. Ayesha Jamal and Mr. Aadil Singh Boparai, Advs.

Versus

THE STATE THR. CENTRAL BUREAU OF INVESTIGATION ..... Respondent

Through: Mr. Ripu Daman Bhardwaj, SPP with Mr. S.K. Sinha (SP, CBI) and Mr. Harish Chander (IO) for CBI.

\+ **<u>W.P.(CRL) 947/2018, Crl. M.A. 5862/2018</u>**

RAHUL AGGARWAL ..... Petitioner

Through: Mr. Salman Khurshid, Sr. Adv. with Ms. Ayesha Jamal and Mr. Aadil Singh Boparai, Advs.

Versus

CENTRAL BUREAU OF INVESTIGATION ..... Respondent

Through: Mr. Ripu Daman Bhardwaj, SPP with Mr. S.K. Sinha (SP, CBI) and Mr. Harish Chander (IO) for CBI. SI

\+ **<u>W.P.(CRL) 971/2018</u>**

VIJENDER YADAV & ANR ..... Petitioner

Through: Mr. Ashutosh Lohia with Mr. Rohan Dewan, Adv.

Versus

STATE THRU CBI ..... Respondent

Through: Mr. Ripu Daman Bhardwaj, SPP with Mr. S.K. Sinha (SP, CBI) and Mr. Harish Chander (IO) for CBI.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J

1. These writ petitions impugn the order on charge dated 6.9.2017 and charge dated 13.6.2017 passed by the learned Special Judge (PC Act) CBI-03 North-West District, for offences under sections 120 B IPC read with section 7 and 13 (1) (d), 13(2) and S.12 of PC Act 1988.

2. Rahul Agarwal (A-1) a Sub-Divisional Magistrate (SDM) is alleged to have conspired with co-accused Sandeep (A-2) for extracting monies as illegal gratification from one Ashwini Yadav (A-4) through the latter's father Mr Vijender Singh Yadav. Ashwini was constructing the building at village Naharpur, Rohini, Delhi. A-1 served a notice upon A-4 under section 133 Cr.PC through co-accused Sandeep, which was later sought to be settled through illegal gratification of Rs.2 lacs. According to the prosecution's source information Ashwini agreed to pay the illegal gratification through his father A-3 on 2.6.2016. A trap was laid. It is recorded in the impugned order as under:

> *"..... It is submitted that thereafter a trap team was constituted and after conducting pre-trap proceedings in CBI office, all the trap team members including independent witnesses left for the spot at village Naharpur, Rohini Sector -7, New Delhi, where source informed at about 5:10 PM*

that Sandeep (A-2) would come in vehicle no. DL 8CT 2927 white Santro GLS car at shop of Ashwani Yadav (A-4) to collect the bribe amount and accordingly the TLO alerted the trap team members and at about 5:15 PM, above said Santro car was seen coming from the side of Bhagwan Prashuram Road and it was being driven by Sandeep (A-2). It is further submitted that thereafter accused – Vijender Singh Yadav (A-3) came there and sat inside front seat of the car and after about 10-15 minutes, Vijender Singh Yadav (A-3) came out from the car and Sandeep (A-2) started the car and they were intercepted by the TLO and bribe amount of Rs. 50,000/- was recovered from the aforesaid car. It is submitted that thereafter, accused Ashwani Yadav (A-4) was also brought at the spot by the trap team members and during the trap proceedings, Sandeep (A-2) informed Rahul Aggarwal (A-1) regarding acceptance of bribe amount which was acknowledged by Rahul Aggarwal (A-1). It is further submitted that as per CFSL report dated 07.10.2016, the specimen voice of accused- Sandeep (A-2), Vijender Singh Yadav (A-3) and Ashwani Yadav (A-4) have tallied with their respective questioned voice. It is submitted that accused- Rahul Aggarwal (A-1) denied giving his specimen voice during the investigation of this case, however his voice has been identified on all the relevant calls by Sh. Rupesh Kumar Thakur, IAS, the then District Magistrate, Sh. Jagdish Singh, then Reader to accused- Rahul Aggarwal (A-1) and Sh. Prasoon Yadav, LDC in the office of SDM, Saraswati Vihar. It is further submitted that during house search of accused-Sandeep (A-2), a cash amount of Rs. 1.5 lacs was seized and said accused disclosed that he collected the said amount from accused- Ashwani Yadav (A-4) in the second week of May, 2016 and he was collecting the remaining bribe amount of Rs. 50,000/- on 02.6.2016 at the time of trap and this entire bribe amount of Rs. 2 lac was to be given to accused- Rahul Aggarwal (A-1) and accused- Vijender Singh Yadav (A-3) has also disclosed that on 17.5.2016 accused Sandeep (A-2) visited their shops at

Naharpur and collected Rs. 1.5 lacs and these disclosure statement were also corroborated by the relevant call conversation dated 12.5.2016. Ld. Sr. PP also submitted that from the investigation carried out by the police, the conspiracy for demand and acceptance of illegal gratification as well as the commission of substantive offences under PC Act, 1988 have been established on the part of all the accused persons and he prayed that the respective charges as stated in the charge-sheet may be framed against the accused persons.

4. On the other hand, it has been submitted by Ld. Defence counsel for accused Rahul Aggarwal (A-1) that the said accused (A-1) was innocent and has been falsely implicated in this case. It is further submitted that in order to satisfy the ingredients of offence punishable under section 7 or section 13(1) (d) r/w section 13(2) of PC Act, 1988, the ingredients of demand and acceptance of illegal gratification have to be prima facie established by the prosecution, however in view of the material on record, the prosecution has miserably failed to bring on record any credible and legally admissible evidence to establish demand and acceptance of illegal gratification by A-1 or any other person on his behalf i.e. A-2. It is submitted that there is no oral or documental evidence to reflect that A-1 either himself or through A-2 demanded any money from A-3 or from A-4. It is further submitted that in none of the telephonic conversation alleged to have been entered into between A-2 with either A-3 of A-4, there is any demand of money and even transcription of such alleged conversation do not reflect that A-2 had made any demand of bribe money either for self or for A-1. It is submitted that disclosure statement of A-2, A-3 & A-4 recorded in police custody were inadmissible as no recovery have been effected in pursuant to the said disclosure statements. It is further submitted that prosecution has wrongly alleged that a telephonic conversation dated 16.4.2016 allegedly between A-2 and A-2 reflect demand of bribe, however, the aid conversation can not in any possible way constitute *demand as the demand ought to be made from bribe givers and not from the third person. It is submitted that in the said conversation dated 16.04.2016 allegedly between A-2 and A-2, there was no mention of any specific address, specific name of person or notice and the word Naharpur mentioned in the said conversation cannot be assumed to be synonymous with the present case property. It is further submitted that there were contradictions between Call No. 1 and Call No. 2 as Call No. 2 shows that there was no discussion between A-2 and A-3 to A-4 about the instant case property prior to 18.4.2016, whereas the contents of Call No. 1 clearly established that the property being discussed between A-1 and A-2 have already been under some kind of negotiations prior to 16.4.2016. It is submitted that the above-said Call No.1 dated 16.04.2016 cannot be solely relied upon in isolation more particularly when it stands contradicted by Call No. 2 dated 18.04.2016 and even otherwise, the contents of said Call no. 1 are highly vague and ambiguous and beyond any comprehension. It is also submitted that there was no oral or documentary evidence on record to prima facie establish that any bribe was accepted by A-1 or anybody on his behalf i.e. A-2 and none of the documents prepared in context with events on 02.06.2016 reflect any incriminating fact qua A-1.*

It has been further submitted on behalf of A-1 that there was neither any witness nor any other documentary evidence cited to support the acceptance of illegal gratification by A-2 from A-3 or A-4. It is submitted that in the instant case, no recovery of any incriminating material has been made from A-1 and prosecution has also miserably failed to bring any document/ material on record to prima facie show that the money recovered from the dashboard of the car of A-2 was bribe money meant for A-1. It is further submitted that in the present case, the prosecution/ CBI has failed to establish any motive or reason for A-3 or A-4 to pay bribe to A-2 on behalf of A-1. It is submitted that in the instant case, MCD had already initiated the proceedings by registering FIR on 26.4.2016 under relevant provisions of

DMC Act and MCD has also sent a show cause notice to A-3 and as such, there was no reason or motive for A-3 & A-4 to make the payment of alleged illegal gratification to A-2 on behalf of A-1 as neither the SDM (A-1) in his official capacity was in a position to extend any favour to A-3 or A-4 nor was it prudent for A-3 & A-4 to give bribe to A-2 for A-1 on 02.06.2016 almost 1.5 months after registration of FIR against them by the MCD. It is submitted that any transcription of telephonic call is a reproduction of electronic data in physical form thus constituting secondary evidence and requires a certificate u/s 65B of Indian Evidence Act and in the present case voice transcription i.e. D-40, D-41 & D-42 are stated to be printout of the conversation contained in an alleged sealed CD and an unsealed CD, thus the same was secondary evidence and therefore it was inadmissible in evidence without certificate u/s 65-B of Indian Evidence Act. It is also submitted that case of the prosecution/ CBI is based on assumption and presumptions ant it has been prayed that accused- Rahul Aggarwal (A-1) may be discharged in this case…."

3. The petitioners argue that there is no evidence of demand and acceptance of illegal gratification between the A-1 and A-4. At best, unbeknownst to A-1, A-2 may have interacted with A-4 and any conversation or transaction between them cannot be even remotely alluded or linked with a one so as to make out a case under sections 7 or 13 (1)(d) or 13(2) of the PC Act. It is contended that the Principal Voice Examination Report (D-56) is not supported by the requisite certificate and searches for five of the Indian Evidence Act therefore the voice recording memo and the said report are inadmissible in law. It is argued that the basic ingredients of the aforesaid provisions of law not even prima facie made out, the impugned order is erroneous and needs to be set aside. It is argued that there is nothing on the record in any of the 29 telephone conversations with your recorded by

the prosecution to link or establish such demand or receipt of illegal gratification by A-1. A-3 and A-4 and argued that they are innocent of the alleged offences. There was no unauthorised construction being done by them or did they receive a statement order under as mentioned above. A-2 submitted that the monies recovered from his car were not marked as given by the complainant and near recovery of the same from the dashboard of car of a private person cannot be said to be bribe it or tainted money. It is also argued that since a FIR had already been registered by the MCD Rohini Zone there was no occasion for A-1 possibly issue a notice to A-4.

4. The impugned order has examined the chargesheet and formed the opinion that the contentions raised by the accused tribal issues, which without counting ample opportunities to the prosecution could not be decided and the stage of any of charge. The reference to case law by the accused was not found of any assistance by the trial court. It has reasoned as under:

> *"....8. In the present case, as per charge-sheet filed by the CBI, a source information was received that Rahul Aggarwal (A-1), SDM, Saraswati Vihar, New Delhi in conspiracy with Sandeep (A-2), who was working as ad-hoc employee in office of the SDM, Saraswati Vihar, New Delhi were indulging in illegal activities and in pursuance to the said criminal conspiracy, office notices under the signatures of Rahul Aggarwal (A-1) were issued to the parties for violation of the government rules with respect to unauthorized/ illegal construction in the properties and the said notices were served upon the parties by Sandeep (A-2), who also used to negotiate with such parties to settle the issues in lieu of illegal gratification. It is further stated that during the investigation, it was revealed that a private person namely Ashwani Yadav (A-4) was constructing a building at village Naharpur, Rohini, Delhi and Rahul*

Aggarwal (A-1) through Sandeep (A-2) served a notice upon Ashwani Yadav (A-4) regarding the said construction of the building at village Naharpur and thereafter Rahul Aggarwal (A-1) in criminal conspiracy with Sandeep (A-2) has demanded illegal gratification of Rs. 2 lacs from Ashwani Yadav (A-4) through Sandeep (A-2) to settle the matter of the notice served upon him. It is stated that Ashwani Yadav (A-4) agreed to pay part of the agreed illegal gratification through his father Vijender Singh Yadav (A-3) to Sandeep (A-2) on 02.06.2016 and Sandeep (A-2) informed that he would visit the premises of Ashwani Yadav (A-4) in the evening to collect the same. It is further stated that thereafter, the present case was registered on 02.06.2016 and trap team comprising of Inspector Anand Sarup as TLO and other CBI officials and subordinate staff and two independent witnesses namely Sh. Harcharan Singh, Manager and Sh. Rahul Sinha, Officer from Punjab & Sind Bank, Zonal Office, Ashram, Delhi was constituted. It is stated that after conducting pre-trap proceedings in the CBI office, all trap team members including aforesaid independent witnesses left for the spot at about 11:05 AM and reached near village Naharpur, Rohini Sector -7, New Delhi at about 12:45 PM, where they waited in the nearby area till 5:10 PM, when source informed that Sandeep (A-2) would come in vehicle no. DL-8CT-2927 white Santro GLS car at shops of Ashwani Yadav (A-4) at village Naharpur and accordingly, the TLO alerted the trap team members and directed shadow witness Sh. Rahul Sinha to remain in close proximity.

It has been further stated that after sometime at about 5:15 PM, a vehicle bearing no. DL 8CT-2927 was seen coming from the direction of Bhagwan Parshuram Road and it was being driven by Sandeep (A-2) and he parked the car in front of shop of Ashwani Yadav (A-4) and remained seated on the driving seat of the car. It is stated that after sometime, accused- Vijender Singh Yadav (A-3) came there and sat inside the front seat of the said car opposite to the driver's seat and this was seen by the TLO and the shadow *witness and the TLO alerted all the trap team members, who reached at the spot and took position in disguise manner. It is further stated that after about 10-15 minutes, Vijender Singh Yadav (A-3) came out from the car and Sandeep (A-2) started the car and trap team members intercepted them and asked about bribe money and on this, Sandeep (A-2) got perplexed and told that he had taken the bribe amount from Vijender Singh Yadav (A-3), which he had kept inside the dash board of the car. It is stated that recovery witness Sh. Harcharan Singh recovered the bribe amount from the car of Sandeep (A-2) which was kept inside the dash board in a white envelope and on counting, the said amount was found to be Rs. 50,000/-. It is further stated that during trap proceedings, Ashwani Yadav (A-4), who was present in his shop, was also taken to the spot by trap team members and thereafter, accused Sandeep (A-2) informed Rahul Aggarwal (A-1) regarding acceptance of bribe amount through a call and Rahul Aggarwal (A-1) used the word "achcha" i.e. OK and thereby shown his acceptance for illegal gratification received by Sandeep (A-2) on his behalf. It is stated that thereafter CBI team alongwith case property and apprehended accused persons left the spot for the DC office, Kanjhawala and when the team reached near Karala village, they were informed by the source that A-1 (SDM) has left the DC office and was coming towards Karala village and the vehicle of the SDM (A-1) was seen coming and he was intercepted by the TLO and thereafter all of them were brought to the CBI office, where recorded conversion was heard by playing the DVR in the presence of both independent witnesses. Thereafter, material/ information relevant to the investigation of the instant case was obtained from Special Unit, CBI, New Delhi including recorded/intercepted incriminating calls. It is also stated that searches were conducted at the premises of all accused persons during investigation and during the house search of A-2, a cash amount of Rs. 1.5 lacs i.e. the remaining bribe amount, was also seized. Further during the investigation, the specimen voices of A-2, A-3, and A-4 were obtained and* *were sent to XFSL, CBI, New Delhi which has opined that specimen voices of all the said accused persons tallied with their respective questioned voice. Rahul Aggarwal (A-1) denied giving his specimen voice, however his voice has been identified on all the relevant calls by Sh. Rupesh Kumar Thakur, IAS the then District Magistrate, Sh. Jagdish Singh, the then Reader to Rahul Aggarwal (A-1) and Sh. Prasoon Yadav, LDC in office of the SDM, Saraswati Vihar and it is stated that the voices of all accused persons in the relevant calls stands verified and established.*

9. In the instant case, during investigation it has been revealed that accused – Vijender Singh Yadav (A-3) and Ashwani Yadav (A-4) were doing illegal construction at the property in question being Khasra No. 16/1, Uday Singh Place, Village Naharpur, Delhi. One Sh. Kapil Yadav, who was son of sister of accused – Vijender Singh Yadav (A-3), had made a complaint to MCD Rohini Zone and SDM Saraswati Vihar regarding the said unauthorized construction and this complaint was entered in the relevant record of office of SDM, Saraswati Vihar, where accused Rahul Aggarwal (A-1) was posted as SDM. Thereafter accused Rahul Aggarwal (A-1) issued restrainment order u/s 133Cr. PC on 05.04.2017 in the name of owner of Khasra No. 16/1, Uday Singh Place, Village Naharpur, near Sector -07, Rohini, Delhi and the same was served through accused- Sandeep (A-2) and was acknowledged by accused- Ashwani Yadav (A-4) under his signature. It is pertinent to note that the said restrainment order bearing original signatures of accused – Aswhwani Yadav (A-4) has been recovered from the car which was in possession of accused – Sandeep (A-2) at the time of trap proceedings.

In the instant case, the perusal of the record reveals that MCD Rohini Zone has also got registered FIR u/s 344 (1) & 343 of the DMC Act against accused- Vijender Singh Yadav (A-3) as the construction was going on without sanction plan and in violation of DMC Act. In this regard, a show cause notice was also issued to accused – Vijender Singh

Yadav (A-3) by the MCD. Further, during investigation it has been revealed that after serving of Restrainment Order u/s – 133 Cr.PC upon accused- Ashwani Yadav (A-4), the accused – Sandeep (A-2) on the directions of accused- Rahul Aggarwal (A-1) contacted accused – Vijender Singh Yadav (A-3) and Ashwani Yadav (A-4) and conveyed them the demand of Rs. 2 lacs and these facts have also been reflected in the CDRs of the relevant period pertaining to mobile phone of accused – Rahul Aggarwal (A-1), Sandeep (A-2), Vijender Singh Yadav (A-3) and Ashwani Yadav (A-4). During the investigation, the transcripts of relevant 29 calls have been prepared and these reveals the demand and acceptance of illegal gratification by accused- Rahul Aggarwal (A-1), who was working as SDM, Saraswati Vihar at the relevant time through accused Sandeep (A-2). It has also been revealed that accused- Rahul Aggarwal (A-1) directed the accused Sandeep (A-2) from his official land-line telephone number -11027393000 on the mobile phone number 8860208473 of accused Sandeep (A-2) on 16.4.2016 to settle the matter of construction in question for Rs. 2 lacs. It is pertinent to note here that during trap proceedings also, accused- Sandeep (A-2) called from his above said mobile number to the mobile number 9971466193 of accused- Rahul Aggarwral (A-1), wherein accused- Rahul Aggarwal (A-1) has shown acceptance of illegal gratification acceptance on his behalf by accused – Sandeep (A-2).

5. It is argued that the date when the raid was conducted by the investigating agency Rs.50,000/- was recovered from A-2 which he was driving. On the same day another amount of Rs.1,90,000/- was recovered from A-2. However, since the alleged demand was only Rs.2 lacs the excess Rs.40,000/- was returned to A-2 by the prosecution. A subsequent application filed by brother of A-2, for return of Rs.1,50,000/- which was allegedly seized from the residence of A-2, it was dismissed by the trial

court on 16.5.2017.

6. It is the petitioner's case that: (i) the impugned order has erred in framing charges against him in the absence of any direct or circumstantial evidence linking him to any demand or receipt of money for illegal gratification; (ii) that the transcript of the telephone conversation relied upon by the CBI reveals that there was no such demand by the SDM from a private citizen; (iii) best, a case could be against Sandeep, who may well be trying to make the proverbial "hay while the sun shines" because of his perceived proximity with the SDM – a government official; (iv) however, the same ought not to be read or construed as a demand by the petitioner/SDM as any illegal gratification.

7. The learned Senior Advocate for the petitioner referred to the 29 telephonic calls out of which only 10 calls were between the petitioner and the said middleman Sandeep (A-2). He submits that even otherwise, apart from a reference to the area in Naharpur (Sector-7, Rohini, Delhi), and the name of the private citizen who is stated to have paid the illegal gratification, the conversations do not mention anything about illegal gratification either for the SDM or to Sandeep. The allusion to Rs.2 lacs does not form a part of any conversation between Sandeep and the private citizen. The learned counsel submits that the reference of Rs.50,000/- is in reference to a steel/ iron shutter. He relies upon the dicta of the Supreme Court in *B. Jayaraj vs. State of A.P.* (2014) 13 SCC 55, to submit that in the absence of any specific demand for illegal gratification, a vague reference

would not form sufficient material/ground for framing of charges or for initiating proceedings under the Prevention of Corruption Act, 1988.

8. The petitioners have also argued that there is no mention of Rs. 2 lacs, in the entire and alleged conversation involving A-1. Relying upon *P Satyanarayan Murthy vs District Inspector of Police, State of AP (2015) 10 ACC 152* is contended that proof of demand of illegal gratification is essential for the offence under sections 7 and 13 (1)(d)(i) and (ii) of the Act and in the absence thereof, the mistaken charge, would therefore fail. The mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, *de hors* the proof of demand, would *ipso facto* not be sufficient to bring home the charge under these two sections of the Act. 'Failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount for the person accused of the offence under section 7 or 13 of the Act would not entail his conviction. Reliance is placed upon *Mukhtiar Singh vs State of Punjab 2017 SCC 136*. Reliance is also placed on *Dashrath Singh Chauhan vs CBI Criminal Appeal No.1276 of 2010* dated 9.10.2018, in which the Supreme Court acquitted the appellant because the twin requirement of demand and acceptance of the amount by the appellant needed to be proven. In case of conspiracy between the appellant and one Rajinder Kumar had been set up. However, was acquitted on charges including of conspiracy under section 120 B IPC. That being the position, it could not be proven that the appellant had conspired with said co-accused for illegal gratification or accepted monies.

9. On behalf of A2 it is submitted that the ingredients of the alleged offence are *prima facie* not made out from the chargesheet. Reliance is placed upon *State of Bihar vs Ramesh Singh 1977 (4) SCC 39*. The disclosure statements of A-2, A-3 and A-4 are not admissible in evidence; reliance is placed *inter alia*, upon *Kamal Kishore vs State 1997 Cri LJ 2016* and *Sahibe Alam vs State 98 (2002) DLT 167 (3).* It is argued that there is no specific reference to any particular property or construction in the alleged conversations; that electronic evidence D11 and D65 are inadmissible in law. It is also argued that there was no complainant in the case.

10. However, the learned counsel for the CBI submits that the conversation between A1 and A2, is apropos other properties as well and the quantum of demand is indicated in the conversation of 28th April. He submits that the Naharpur property is mentioned in the conversation of 31.5.2016 and that there is also a mention of some commission money in the telephone conversation of 1.6.2016. The case of the prosecution is that in the totality of the investigation there was a criminal conspiracy between all the accused persons for demand of illegal gratification, acceptance and recovery of the illegal gratification i.e. of monies being paid to A2, albeit it may not have reached A1. Apropos material evidence – DVR and memory card, u/s 65 of the Indian Evidence Act, it is stated that the prosecution has relied on primary evidence. The prosecution refers to three witnesses confirming that A2 served them notices; statements of two of them have been recorded u/s 164 Cr. PC. For acts of A2, A3 and A4 the respondent refers to the evidence of independent witnesses, which they propose to make good in trial.

11. What emanates from the above is that triable issues have been raised about factual allegations. The impugned order does not call any interference. The petitions are dismissed.

NAJMI WAZIRI, J.

MAY 19, 2020