

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1137 OF 2018

Sunil Hirasingh Rathod	.. Appellant
Versus	
The State of Maharashtra	.. Respondents

WITH

CRIMINAL APPEAL NO. 1039 OF 2018

1 Vilas Ganpati Khillari	
2 Balaji Gurupadabba Birajdar	.. Appellants
Versus	
The State of Maharashtra	.. Respondents

WITH

CRIMINAL APPEAL NO.1102 OF 2018

Satish Bhagwan Palav	.. Appellant
Versus	
The State of Maharashtra	.. Respondents

WITH

CRIMINAL APPEAL NO.1114 OF 2018

Narayan Janba Patil	.. Appellant
Versus	
The State of Maharashtra	.. Respondents

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Mr.Amit Desai, Senior counsel with Mr.Subodh Desai, Mr.Ashwin Thool i/b Kartik Garg for the appellant in Appeal No. 1137/2018.

Mr.Niranjan Mundargi i/b Kunal Ambulkar for appellant in Appeal No.1039 of 2018.

Mr.Girish Kulkarni with Advocate Darshan Juikar for Appellant in Appeal No.1102/2018.

Mr.Nitin Patil for appellant in Appeal No.1114 of 2018.

Mr.S.R. Agarkar, APP for the State

CORAM : BHARATI DANGRE, J.

RESERVED ON: 30th JUNE, 2021

PRONOUNCED : 25th AUGUST, 2021

JUDGMENT :-

1 Through the above mentioned four Appeals, five accused persons assail the judgment and order of conviction and sentence passed in Special Case No. 60 of 2015 by the Special Judge, Mumbai on 18th August 2018 and seek their acquittal, on reversing the impugned judgment holding them guilty of the offence punishable under the Prevention of Corruption Act, 1988 Appeal No. 1039 of 2018 is filed by two appellants, Vilas Ganpati Khillari, Assistant Engineer and

Balaji Gurupadabba Birajdar, Sub-Engineer working in MCGM, F/North Zone, E Ward, Byculla. In Appeal No. 1137 of 2018, the applicant is one Sunil Rathod, Executive Engineer, MCGM, F/North Zone, E Ward, Byculla, Mumbai. Appeal No.1102 of 2018 is instituted by Satish B. Palav working as Liaison Officer through Architect engaged by the complainant and fourth Appeal vide No.1114 of 2018 is filed by Narayan J. Patil, a private person.

In view of the order passed on 22th October 2018 in Criminal Application No.1611 of 2018, in Appeal No.1137/2018, the hearing of the Appeal was expedited. The office made the Appeal ready for final hearing in the month of April 2021 along with the connected Appeals. By consent of all the parties, the Appeals were taken up for hearing.

2 Learned Senior Counsel Mr.Amit Desai represent the appellant Sunil Rathod, Advocate Niranjan Mundargi represent the appellants Khillari and Birajdar and he also represent the appellant Narayan Patil. Advocate Girish Kulkarni a/w Advocate Kartik Garg represent the appellant Mr.Palav. In all the Appeals, State is represented by the learned APP Mr.Agarkar.

3 The appellants are described by their nomenclature during the trial, in view of the distinct appeals which they have filed.

 Before proceeding to the challenge to the impugned judgment, the prosecution case can be briefly summarized as under :-

4 In the month of October 2014, the Accused no.1 was serving on the post of Assistant Engineer, MCGM, F-North Zone, E-Ward, Byculla, Mumbai, while the Appellant No.2 was serving as Sub-Engineer in the very same office in which the Appellant Sunil Rathod was serving as Executive Engineer. The accused nos.1 to 3 were public servants within the meaning of Section 2(c) of Prevention of Corruption Act, whereas the appellant no.4 is a private person, an Architect by profession and engaged in liasoning work between various persons and MCGM Officials. Accused no.5 was working as helper with one of the Architects in Mumbai.

 The complainant (PW 1) and his partner PW 2 are into construction business being carried out in the name and style as “Tirupati Developers”. The business is run as a partnership firm, which is registered, having its office at Dombivali and the prosecution case revolve around a

development work being undertaken by the said firm in respect of one Date Bhavan located at 167-B, City Survey No.144-B, 10, Babasaheb Ambedkar Road, Mumbai. An application was moved for permission for redevelopment and construction work from the Government of Maharashtra. After obtaining the said permission, applications were moved with the MCGM for the project to be undertaken. The case of the prosecution is that the Accused nos.1 to 3 were handling the work of grant of Intimation Of Disapproval (IOD) for the complainant's firm and that the accused no.1 and 2 demanded sum of Rs.15 lakhs and Rs.10 lakhs respectively from the complainant on 10th October 2014 for issuance of IOD for their project and since the complainant had no intention to pay the bribe amount as demanded, he lodged a complaint with the office of Anti Corruption Bureau (ACB).

For the purpose of verification of the demand, the panch witnesses were directed to accompany the complainant and accordingly, they visited the office of the accused persons on 10/10/2014, 16/10/2014, 17/10/2014 and 18/10/2014 and the prosecution claim that the demand of bribe amount by the accused nos.1 and 2, was verified. The conversation between the complainant and the accused persons came to be

recorded. The eventual trap was laid on 20/10/2014, during which the prosecution claim that the accused no.1 accepted the bribe amount of Rs.10 lakhs from the complainant through accused no.4 Shri Palav, whereas the accused no.2 Balaji Birajdar accepted bribe amount of Rs.5 lakhs from the complainant, and he transmitted the amount outside his office through Accused no.5 Narayan Patil. As per the instructions given to the complainant, when the pre-decided signal was received, the raiding team of the ACB arrived along with the panchas and the bribe amount came to be recovered from accused no.4, whereas Accused No.2 who had handed over the amount to accused no.5, was called with the amount and accordingly, an amount of Rs.5 lakhs came to be recovered from him. The bribe amount was scanned under U.V rays and traces of Anthracene Powder was found on the person of the accused nos.1 and 2 along with accused nos.4 and 5.

5 The trap by ACB and the recovery of bribe money culminated in registration of FIR at the instance of the complainant with ACB, BN, Mumbai, vide C.R. No. 74 of 2014, invoking Sections 7, 13(1)(d) and 12(2) of the Prevention of Corruption Act, 1988. On completion of investigation, charge-sheet came to be filed before the learned

Special Judge, Mumbai and the case was registered as Special Case No.60 of 2015.

6 Charge came to be framed against the accused persons initially on 29th November 2016 and additional charge was framed on 4th June 2018. It would be appropriate to refer to the charge levelled against the accused persons for effective appreciation of the case of the prosecution.

Accused nos.1 to 3 are charged under the P.C. Act, in their capacity as public servants. They are charged under Section 7 of the P.C. Act for demanding and attempting to obtain sum of Rs.15 lakhs and Rs.10,000/- respectively from the complainant on 10/10/2014 as gratification other than legal remuneration as a motive or reward for showing favour to the complainant for starting redevelopment work at Date Bhavan which they were authorized to give. Further, the accused no.1 also faced charge for demand and attempt to obtain an amount of Rs.15 lakhs on 16th October 2014 as a gratification or reward for issuing IOD and thereby committing offence under Section 7. of the Act. Both the aforesaid accused persons are further charged for demanding and accepting bribe on 20th October 2014 at 3.30 p.m from the complainant. The said accused persons are also charged

with Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act by obtaining pecuniary advantage on 20/10/2014 at 3.30 p.m in the BMC Office, Byculla, Mumbai. As far as accused no.3, the Executive Engineer is concerned, he is charged for abetting accused nos.1 and 2 in commission of the offence by threatening the complainant to comply with the aforesaid demand on the aforesaid date, time and place, and by giving guarantee of performance of job to the complainant in satisfaction of the illegal demand and thereby committing an offence punishable under Section 12 of the P.C. Act. The private person Satish Palav (Accused no.4) is charged for accepting an amount of Rs.10,000/- on 20/10/2014 from the complainant by and on behalf of accused no.1. and for remaining present with him while the amount of Rs.5 lakhs was accepted by accused no.2. He is charged under Section 12 of the P.C. Act. As far as accused no.5 is concerned, he is charged for helping accused no.2 in moving away the tainted amount of Rs.5 lakhs from his drawer outside his office so as to cause disappearance of the amount and thereby committing an offence punishable under Section 12 of the P.C. Act.

The additional charge was framed against accused no.2 under Section 7 of the Act for demanding an amount of Rs.10 lakhs on 18/10/2014 and for conceding to the request of the partners of the firm to reduce the amount and accept the same as illegal gratification other than legal remuneration and thus for committing an offence under Section 7 of the Act.

As all the accused persons, pleaded not guilty, they were subjected to trial in the Special Court.

7 At the commencement of the trial, the Public Prosecutor tendered a list of documents to be relied upon by the prosecution and accused nos.1 to 3 barring their service record, did not admit any documents, whereas accused nos.4 and 5 did not admit a single document.

The prosecution laid its case before the Special Court through 11 witnesses; the complainant being examined as PW 1 along with his partner Jagdish Raje being examined as PW 2. PW nos.3 and 4 are the technicians with the ACB who recorded the voice sample and the verification, pre-trap and post-trap panchnama. PW 5, PW 7 and PW 8 are the Nodal Officers of the Service Provider who produced CDR of the mobile phones. Two panch witnesses who participated in

the raid are examined as PW 6 and PW 9. The Investigating Officer of ACB is examined as PW 10, whereas Scientific Officer at FSL on the point of the recorded conversation is examined as PW 11. The sanction to prosecute the accused persons issued by the Commissioner of Municipal Corporation qua accused nos.1 to 3 is also produced on record by the prosecution. The statement of all the accused persons came to be recorded under Section 313 of the Code of Criminal Procedure where apart from denying the prosecution case, all five accused persons submitted a written say in support of their defence, with a plea of false implication and to establish their innocence.

8 On appreciation of the material placed before it, learned Special Judge found the accused guilty of charge framed and recorded a finding of guilt and on hearing the accused on sentence, imposed the sentence. The accused nos.1 and 2 on being convicted under Section 7 of the P.C. Act are sentenced to suffer RI for 3 years and to pay fine of Rs.15,000/-, and in default to suffer SI for 3 months. As far as their conviction under Section 13(1)(d) read with Section 13(2) of the Act is concerned, both the accused are sentenced to suffer RI for 4 years and to pay fine of Rs.5,000/- and in

default to suffer SI for three months. Sentences imposed are directed to run concurrently. Accused no.3 is convicted for the offence punishable under Section 7 of the Act and sentenced to suffer RI for 3 years with fine of Rs.10,000/-, in default to suffer SI for 3 months, though never charged u/s.7 of the Act. Accused nos.4 and 5 on being convicted under Section 12 of the Act are sentenced to suffer SI for three years and fine of Rs.5,000/- in default to suffer SI for three months.

It is against this judgment, the present four Appeals are instituted by the five accused persons.

9 The learned Senior counsel Mr.Amit Desai a/w Advocate Subodh Desai appearing for the accused no.3 would urge that the impugned judgment is perfunctory as it failed to appreciate the evidence and the learned Judge has entirely missed the conspectus of the matter. By inviting my attention to the impugned judgment, he would urge that not a single sentence in the judgment incriminate him and he is at loss to understand what is the evidence on record to warrant his conviction and subsequently, to sentence him. According to Mr.Desai, the prosecution has sought to propound two false and baseless stories against the appellant, which he is representing; the allegation is on 10/10/2014, the

complainant visited the office of the appellant where he met accused no.3 and thereafter, he met accused nos.1 and 2, at that time a demand of Rs.15 lakhs and Rs.10 lakhs was raised by the said accused persons. As far as the visit of the complainant in the office on 18th April, the learned counsel would submit that there is no demand which has been established during the said meeting with Mr.Rathod. On the day of the raid i.e. 20/10/2014, while the complainant and others were in the office corridor, it is alleged that at 1.30 pm, the appellant called the complainant and PW 2 in his cabin and discussed about a PIL and allegedly he called the accused nos.1 and 2 and asked them to do the complainant's work at the earliest. The further case of the prosecution that PW 2 informed the appellant that they do not have the entire amount, and thereupon appellant asked PW 1 and 2 to give whatever they are carrying and to pay the remaining amount within 8 to 10 days, is without any basis and do not stand supported any positive evidence. The actual trap is fructified in the later part of the day and the submission of the learned counsel is that even as per the prosecution case, the appellant is not a privy to the demand or to the acceptance of the alleged bribe amount.

By inviting my attention to the documents on record, Mr.Desai would submit that the story of the prosecution of the amount being demanded is contrary to the record as the IOD was signed and made ready on 17/10/2014 itself and therefore, any threat, persuasion, whatever you call it, at the instance of the appellant who was the superior authority of accused no.1 and 2, do not inspire any confidence. Further, according to Mr.Desai, the reference to the demand of bribe of Rs.25 lakhs by the appellant through Mr.Anthony for issuance of IOD in the past, is a feint, as neither any complaint was filed about the said demand nor any witness is examined, thereby making the said allegation unbelievable. Mr.Desai is also extremely critical of the manner in which the prosecution has worked out the laying of trap though he submit that taking the case as it is, the appellant Mr.Rathod is not at all involved in the alleged demand and its acceptance, and the charge against him is under Section 12 and therefore, his fate would depend on the outcome of the proof of demand and acceptance at the instance of the other two accused, the public servants. Mr.Desai has also invited my attention to an important aspect of the matter, being that the process of investigation i.e. raid came to be conducted on the basis of the complaint and after

the entire process was over, FIR came to be filed. He would pose a question of great importance as to whether the ACB has the power to arrest prior to registration of FIR, as admittedly, FIR came to be filed on 21st October 2014 immediately after the alleged raid. Laying emphasis on Article 21 of the Constitution which stipulate that no person should be deprived of his life and personal liberty except by following procedure established by law, he would question the exercise undertaken by the ACB. Furthermore, Mr.Desai would also urge to look into the ingredients of offence of abetment and urge that the testimony of the witnesses ought to be carefully scrutinized for assessing any abetment which would attract Section 12 of the P.C. Act.

10 Learned counsel Mr.Mundargi appearing for accused nos.1 and 2 would urge that the case of the prosecution is insufficient to draw conclusion that the appellants had demanded any amount by way of bribe. He would also submit that the learned Judge has completely ignored the defence of the appellant of total denial and the vital fact that there is no evidence, either oral, documentary which prove Demand and Acceptance which are two necessary ingredients for proving an offence u/s. 7 of the P.C.Act. The material contradiction and inconsistencies in

the statement of PW 1 and PW 2 on one hand, and with that of the panch witnesses on the other hand, according to Mr.Mundargi, fall short of conclusively establishing the case by the prosecution. Several contradictions and omissions and inconsistencies were pointed out to the trial Court during the course of oral arguments but none of them are referred to, is the submission of the learned counsel. Further, the transcript which is brought on record is not established conclusively, is another submission.

11 Learned counsel Shri Girish Kulkarni appearing for Accused no.5 Palav also adopt the submissions of Mr.Mundargi. On behalf of accused nos.4 and 5, the submission is in the prosecution case, they could have been prosecution witnesses but came to be arraigned as accused which is traversity of justice. The submission is that they are neither part of the office of Corporation nor are they privy to any alleged demand by the accused persons and therefore, their indiction in the offence itself, is just another blemish but it did not stop here, and by the impugned judgment, they have been held guilty of the offence punishable under Section 12 of the Act in absence of any evidence to hold them so.

12 Learned APP Mr. Agarkar conceded to the fact that the demand is not proved by the prosecution and there is no corroboration to the version of the complainant as the prosecution witnesses did not accompany the complainant barring the date of trap on 20/10/2014, and even on this date, the other prosecution witnesses and the complainant are not on the same page. The learned APP concede that the Sessions Court has failed to appreciate the evidence brought before it, in its proper perspective but he leave it to the discretion of the Court to take a view as it deems fit on appreciation of the evidence in exercise of its appellate power.

13 The complainant (PW 1) approached the ACB, Mumbai on 10/10/2014 stating that he along with one Mr. Raje (PW 2) are the partners of a Company known as Tirupati Developers and are into construction business. He reported that 7 to 8 years back, an agreement for development of one building located in Dadar was executed by the complainant with the owner of the building and the tenants. In connection with the very same building, a proposal was forwarded for obtaining IOD in the office of the Assistant Engineer, Building Proposal, F/North Zone, Byculla on 5th February 2014, which received approval from the

Commissioner, Mumbai and for further steps, the proposal was pending for approval in the office of accused no.1. The complainant alleged that for approving the said proposal, the Sub-Engineer Shri Birajdar (Accused no.2) demanded an amount of Rs.10 lakhs and Assistant Engineer Khillari made a demand of Rs.15 lakhs, and expressed that if the amount is not paid, the development of the building may pose difficulty.

The complainant also reported to the ACB that at an anterior point of time, the accused no.3 Executive Engineer, Rathod had also demanded an amount of Rs.25 lakhs and he was compelled to satisfy the said demand and despite this, the issuance of IOD was being delayed. He specifically alleged that for every approval, money is being demanded and since he was not desirous of paying the bribe amount, he lodged the complaint against Khillari and Birajdar. The complaint is signed by PW 1.

14 The complaint was received by PI – ACB, Mumbai Mr.Hemant Patil who reduced it in writing as per say of PW 1. Two panch witnesses PW 6 and PW 9 working in the office of Charity Commissioner, Mumbai were summoned. Copy of the complaint was handed over to them

and they also put their signatures on the complaint. For the verification of the demand, it was decided that the complainant shall meet both public servants and the conversation shall be recorded through Voice Recorder. One Mrs.Wadkar, PW 4, a technician was involved in the process who brought a Voice Recorder of Sony Company and SD card was inserted in the same and after formatting the same, the complainant was directed to switch on the Voice Recorder before he meet the accused persons. The record reflect that there are four panchnamas exhibited, being panchnama dt. 10/10/14 (Exh.44), panchnama dt.16/10/2014 (Exh.45), panchnama dt.17.10.2014 (Exh.46) and verification panchnama dt. 18/10/2014 (Exh.47). These panchnamas are exhibited through PW 6 Amol Balasaheb Jadhav who was instructed to act as shadow panch.

15 Evidence of PW 10 (Investigating Officer) disclose that on receipt of the complaint, he decided to conduct the verification regarding the alleged demand and it was decided that the complainant shall meet the public servants and talk regarding the work so that the demand can be ascertained and necessary instructions were given to the complainant to that effect. The first verification is attempted

on 10/10/2014 when PW 10 and other ACB staff comprising of panch witnesses and complainant proceeded towards Byculla office, E-Ward. The Voice Recorder was affixed to the Banyan of the complainant by PW 4. PW 10 however, depose that the complainant requested him that he shall see the public servants alone and accordingly, he went to the E-Ward, BMC, where the ACB team stayed near the vehicles.

From this point of time, the prosecution rely upon the version of the complainant who is alleged to have stated that Khillari (Accused no.1) demanded an amount of Rs.25 lakhs; Rs.15 lakhs for himself and Rs.10 lakhs for accused no.2. The panchnama Exhibit-44 record that the complainant alone proceeded to meet the accused persons and on coming back, he disclosed that he met one private person (PW 4) and accompanied by him, he went to meet accused no.1 where accused no.2 was also present and in the conversation, a demand was raised for Rs.25 lakhs. The complainant was asked to report with money on 16/10/2014. When the complainant came back, the Voice Recorder was switched on and transcript was scribed by PW 4. Exhibit-44 include the transcript which record the discussion between PW 4 and the complainant along with accused no.1 Khillari and accused no.2 Birajdar. In the transcript of the

conversation, the accused no.1 is recorded to have welcomed one Ghosalkar and there is some discussion about the plan and at times, the transcript record that the conversation is not audible. Thereafter, the accused no.2 also participated in the conversation where some discussion is taking place about some floor height, NOC, but it is recorded that the conversation is largely not audible. The fact, however, remains that the verification of the demand did not take place in presence of the panchas and what prosecution rely upon, is the version of PW 1. PW 1 also involve accused No.3 when he state that accused no.1 took him to the cabin of accused no.3, who directed PW 1 that he should follow the directions of Mr.Khillari, otherwise the job would be held up. After having such talk, he came down from the said building where the raiding staff was found standing on the ground floor.

16 The next date of verification of demand is 16th October 2014, when as per version of PW 1, he accompanied by PW 2, went to ACB Office at about 1.30 p.m. After completing the necessary formalities, including the concealing of the recorder on his person and also on the person of PW 2, they proceeded to the office of BMC of 3rd floor at Byculla where they met accused no.4 Palav. The

version of PW 1 is that thereafter, they all proceeded to the cabin of accused no.1 where he reiterated his demand of Rs.15 lakhs for himself and Rs.10 lakhs for accused no.2. On such demand being raised, PW 2 told him that they were not in a position to pay such huge amount and asked whether half of the amount can be paid. In reply, Khillari told him that he would also issue part of the IOD. PW 2 then inquired with accused no.1 whether accused no.2 could reduce his amount which was responded by saying that he can himself be asked about it. Thereafter, according to PW 1, they went to the cabin of Birajdar which was in front of cabin of Khillari but he was not present there. Thereafter, they came down the building and the voice recorders were played and the conversation heard and transcript was prepared. As per PW 1, they were asked to visit again on the next day for verification of the said demand. This itself establish that the demand could not be ascertained on this visit also. The panchnama is exhibited at Exhibit-45.

17 Another attempt to verify the demand was made on 17/10/2014, when the complainant and Raje (PW 2) proceeded to meet the public servants in their office after following the necessary formalities of trap. On this occasion, PW 6 accompanied the PW 1 and PW 2 to the BMC office.

After half an hour, when they returned, the transcript of recording was prepared. As per PW 1, they met accused no.3 Mr.Rathod who made inquiry about the PIL which was filed and he told the complainant that it was their responsibility to get the PIL withdrawn in absence of which their work is likely to be held up and during his talk, accused no.1 Khillari was also present in the cabin. Thereafter, he visited the cabin of accused no.2 Birajdar and the panch witness followed. Once again, Raje asked Birajdar to reduce the amount and he got a reply "as per your wish". Thereafter, they came down from the building, the tape recorder was switched off, the conversation was played and heard.

18 Now, since PW 6 was accompanying the complainant, the evidence of PW 6 assumes significance who depose that he was told by the PW 10 to follow PW 1 and PW 2 when they visit the BMC office and accordingly, he followed them at some distance. proceeded further and he followed them by keeping some distance. On reaching 3rd floor, PW 1 and 2 entered in a cabin displaying name of Mr.Rathod and he kept waiting outside the cabin. After 20 minutes, they came out of the cabin and he followed them till they reached the vehicle of ACB. The version of PW 1 and PW 6 is at variance as according to the panch witness, after

coming out of the cabin of Rathod, they came out of the building, whereas version of complainant is that they entered the cabin of Birajdar, where discussion took place about reducing of the bribe amount. Version of PW 6 is that Raje disclosed to the ACB officials that he was not able to meet the public servants at that time and after coming to the ACB office, no transcript was prepared. PW 6 and 10 corroborate each other on the aspect that the same micro SD card was decided to be used on the next day and accordingly, the panchnama was drawn which is marked as Exhibit-46.

On 18/10/2014, when PW 1 and 2 again went to the ACB office at 4.00 pm, and after following the procedure, they approached the office of accused persons, but were unable to meet anyone, and therefore, there is no verification of demand.

19 The next day decided for verification of demand was 20th October 2014.

As per prosecution case, PW 1 and 2 along with the team visited the BMC office on two occasions, on this day. This time, with a cash amount of Rs.15,10,000/-. PW 1 and 2 visited ACB office at 9.00 am with the cash amount and met PW 10 in the presence of both the panchas. The

Anthracene powder was applied to 1000 currency notes of denomination of Rs.500/- and the amount was divided in two bundles, Rs.10 lakh and Rs.5 lakh each. Notes were wrapped in paper and then again wrapped in a red cloth bag which was handed over to the complainant. He was instructed to give the signal on handing over the tainted amount when demanded. The panch witnesses were asked to listen to the conversation.

At about 1.00 p.m, they reached the BMC office and the DVR was concealed on the person of PW 1 and PW 2 which was switched on. PW 1 and PW 2 proceeded to 3rd floor of BMC and panch witness Pawar (PW 9) and other raiding staff followed them. As per PW 1, they entered the cabin of accused no.3 – Mr.Rathod who made inquiry about the PIL. Mr.Raje told Mr.Rathod that they had already given Rs.25 lakhs but Khillari (A1) was demanding Rs.15 lakhs and Birajdar (A2) was demanding Rs.10 lakhs but they had brought amount of Rs.15 lakhs to be offered, and if they are asked to accept the said amount, they would promptly get the IOD. Thereafter, Mr.Rathod called Mr.Khillari in his cabin and Mr.Birajdar also came. As per PW 1, Rathod asked them to accept the amount and also instructed them to issue the IOD on that day itself. After that, they came out of the cabin

along with Mr.Khillari and on offer by Mr.Raje to accept the amount, Khillari told him that he do not want the money there and told that Mr.Palav would contact them and then only they should bring the money. Thereafter, they came out of the building and made phone call to Mr.Palav, who was informed about the details of talk between Raje and Khillari. Thereafter, PW 1 and 2 proceeded to their office at Dadar. This is the first part of the trap which is alleged to have taken place on 20th October 2014.

20 After having lunch, Raje made phone call to Palav and Palav informed him that Birajdar wanted to go to his native place and therefore, they should reach Byculla office with money. Accordingly, they reached the office and were accompanied by PW 9 to the F, North office of BMC. The other raiding staff including PW 10 followed them at some distance.

21 As per PW 1, they met Palav on 3rd floor and thereafter with him, he proceeded towards the cabin of Mr.Birajdar, being followed by panch witness (PW 9). Birajdar was sitting in his cabin and PW 1 told him that he had brought the money demanded by him and he handed over an amount of Rs.Five Lakhs wrapped in paper, which he

received by both hands. He kept it in a red colour bag and that bag was kept in drawer no.2 of his table. Thereafter, he entered the cabin of Khillari (A1) which was in front of cabin of Birajdar and it was open. He along with Mr.Palav followed by Mr.Pawar went there and PW 1 kept standing at the door of the cabin, whereas Palav went inside and told Khillari that PW 1 brought the money as per demand. Since some people were sitting in the cabin, PW 1 did not step inside and accused Khillari asked Palav to receive the amount. Case of PW 1 is that he could hear the conversation and when Palav approached him, he handed over amount of Rs.10 lakhs to him in a red bag. Mr.Palav accepted the bag and started proceeding for keeping the money as per directions of Mr.Khillari. PW 1 gave a signal to the raiding party of acceptance of bribe amount and Palav, Khillari, Birajdar came to be apprehended. Accordingly, the post trap panchnama was drawn.

22 PW 10 corroborate PW 1 on the procedure that was followed on 20th October 2014 in the pre-lunch session when PW 9 accompanied PW 1 and PW 2 on the third floor office followed by the raiding team. PW 10 however, do not support the version of PW 1 that accused nos.1 and 2 were also called in the cabin of Rathod and as per his version, PW

9 was also kept waiting outside the cabin where even he was standing. About the post lunch exercise, PW 10 has deposed that PW 1 and PW 9 went to the third floor of the office followed by PW 10 and his raiding team. They met one person outside the cabin of accused no.1 and they had a talk with the said person. Thereafter, PW 1, PW 9 and the said person went in the cabin of accused no.2 where the bribe amount was handed over to accused no.2. Thereafter, PW 1, PW 9 and the said person came outside the cabin of Accused no.1 and the said person, entered in the cabin of Khillari and came outside and received the amount from PW 1 and while he was going to keep it as per instructions of accused no.1, PW 1 gave the signal and the accused persons were caught red-handed.

23 The version of PW 9 – the panch who was also accompanying PW 1 and Mr.Palav is also relevant. In contrast to the deposition of PW 1, he state that he accompanied PW 1 on third floor and they stood in front of cabin of Rathod when one person came towards them and then he proceeded towards cabin of Khillari. There is inconsistency in the version of these two prosecution witnesses about how Mr.Palav (A4) arrived at the scene. The

complainant entered in the cabin of Birajdar whereas PW 9 kept standing next to him in the cabin and PW 9 categorically depose as under :-

“They both had discussion regarding the work. Khillari had taken out the amount of Rs.5 lakhs from the red bag and gave the same to Birajdar”. The said amount was accepted by Birajdar and kept in his red bag”.

Neither PW 9 nor PW 1 had gained entry in the cabin of Khillari (A1) and the reason given by PW 1 is since some people were found sitting in front of Khillari, he did not enter.

24 Accordingly, on completion of the raid, the panchnama was drawn which record with details of the trap and the recovery of the amount from the accused persons. Pertinent to note that the panchnama record that when the Investigating Officer inquired from Palav about the bribe amount, it was traced with Mr.Palav (A4) and as far as the amount handed over to Birajdar is concerned, it was recovered from Accused no.5 – Narayan Patil. The trap panchnama is also accompanied with the transcript of the conversation amongst the honking and voices of some other persons.

25 PW 2 – partner of the complainant is also examined by the prosecution in its support. He was present with the complainant when the panchnama was executed on 16/10/2014, 17/10/2014, 18/10/2014 and 20/10/2014. PW 2 was also present with PW 1 when he visited the ACB office on 20th October 2014 with the cash amount to be offered as bribe and he also accompanied him to the Byculla office at 1.00 p.m, when the tainted money was carried by PW 1 to be paid to accused nos.1 and 2 as per their demand. He corroborate PW 1 that on their visit to the office, when they were called by Mr.Rathod. However, he depose that Mr.Rathod asked the persons sitting in his cabin to leave and he inquired whether Mr. Gajargaonkar was available. PW 2 bring up a new version here, when depose that he told Mr.Rathod that he had already paid him an amount of Rs.25 lakhs, which he admitted and he told that Mr.Khillari and Birajdar were also demanding amount and they had brought Rs.10 lakhs for Khillari and Rs.5 lakhs for Birajdar. At that time, Mr.Rathod told him that they also have to pay money to Mr.Gajargaonkar and then he called Mr.Khillari and he was told by Mr.Rathod that the amount was brought as per their demand. PW 2, however, do not mention of presence of Mr.Birajdar, in the cabin of Mr.Rathod. As far as second visit

to the office of the accused persons, PW 2 do not throw any light as he depose that he was asked by PW 10 to wait on the ground floor and the complainant, the IO and the other staff along with panch witnesses had gone to the office of BMC. PW 2, is therefore, not a witness to the proceedings of raid conducted in the cabin of accused no.1 and accused no.2 from where the tainted money is seized on 20/10/2014 – in the post lunch session.

26 Broadly, this is the spectrum of evidence brought on record by the prosecution to establish two essential ingredients of the charge being, Demand and Acceptance of the bribe amount of Rs.10 lakhs and Rs.5 lakhs respectively by the accused nos.1 and 2.

I will refer to the aspect of recording of the conversation at a little while later.

However, at this stage, I advert to the stand taken by the accused persons to rebut the presumption under Section 20(1) of the P.C. Act. Apart from denying the case of the prosecution in their statement under Section 313 of the Cr.P.C, written statement is brought on record by each of the accused person.

In the statement of accused no.1 exhibited as Exhibit-107-A, he has put up a specific case by stating that the complainant had put forth a proposal for redevelopment of Om Sat Niwas and the said building was declared as dilapidated structure. The said proposal was not as per the terms and conditions of the BMC and some shortfalls were found in the same and since the building was repairable, it was not certified as a dangerous structure. The said building was not a cess building and therefore, the FSI which was available was 1.33 but, if the building was to be declared as dilapidated, the available FSI would be 2.5 and the complainant would have been benefited out of it. But since the said plan of the complainant and his partner was not allowed to fructify, accused no.1 has been falsely involved in the allegations with a vengeance. Accused no.1 take a stand that on 10th October 2014, he had called Architect Vijay Shah for discussion on a proposal and Mr.Birajdar was also called by him to participate in the discussion. At that time, the complainant entered his cabin and attempted to interrupt the discussion and initiated a conversation about the IOD and the development cess of Rs.25 lakhs. He left the cabin on being informed that he was busy. It is his case that on 10/10/2014 itself, the draft IOD was approved by him and

accused no.3 Mr.Rathod. The accused has offered explanation about every visit of the complainant in his cabin being on 16/10/2014 and 17/10/2014. He state that on 20/10/2014, he received 8 copies of IOD to be issued to the complainant/Mr.Raje by post. He immediately signed the copies and forwarded it for dispatch which was received by their representative on 20th October 2014 itself from the outward department. He deny the case of the prosecution in totality.

Accused no.2 has also furnished his statement denying the case of the prosecution and by asserting that on 5th February 2014, a proposal was received on behalf of Tirupati Developers for redevelopment of Date Bhavan. This proposal required No Objections from various departments and on scrutiny of the proposal, it was forwarded to the Commissioner on 6th August 2014. Thereafter, the file was received in the office of accused no.2 through the Chief Engineer, Building Department and Executive Engineer (Accused no.3), Asstt. Engineer (Accused no.1). He prepared a draft IOD on 29th September 2014 and also calculated the premium to be paid for the development work and this was communicated to the Architect which contemplated the following amounts to be paid.

1	<i>Development Cess</i>	25,62,700/-
2	<i>Fungible Premium</i>	1,66,99,000/-
<u>3</u>	<i>IDO Deposit</i>	25,900/-
4	<i>Debris Deposit</i>	45,000/-

The total amount due to be paid before issuance of IOD was Rs.1,93,32,600/-. However, it is alleged that the complainant and his partner were requesting for scaling down the amount of Rs.25 lakhs towards development cess and on refusal on part of the accused to do so, he is falsely implicated. On 17/10/2014, he received the maps of Date Bhavan by post along with a receipt dated 16/10/2014 about payment of Rs.1,93,32,600/- towards premium. The original copy was, therefore, signed on 17/10/2014 by all the three accused persons and since only one copy of map was received from the Architect, only 1 original copy was prepared. On 20/10/2014, he received copies of the map and the approval papers, on which he signed in the morning and forwarded the same to the inward – outward Department. About the incident post-lunch on 20/10/2020, accused no.2 has offered an explanation that one Shri Avinash Patil, an Architect of M/s.Aakar was sitting in his cabin since he required a commencement certificate. At that time, the complainant entered his cabin, which was open and wished him a

prosperous Diwali and dropped a box with red wrapping by saying that it contains sweets and immediately left. Thereafter, Avinash Patil also left his chamber and since he was to proceed to his home town for Diwali, when the accused no.5 who visited his chamber for discussing one proposal, he was handed over the said packet assuming it to contain sweets since it was perishable and he thought he did not want to carry it since he was to leave for his village.

27 The accused no.3 Mr.Rathod has also submitted his separate statement vide Exhibit-109-A, which is more or less on the similar lines as the earlier statements. He take a stand that it was imperative for the complainant/developer to pay premium before issuance of IOD, but PW 1 and PW 2 were making request to condone the development cess which was refused and therefore, he was involved by the complainant falsely. Accused no.3 has specifically stated in his statement that on 17/10/2014, he had already signed the original of the draft IOD which was received by him on 10/10/2014. He state that all the proceedings in respect of Date Bhavan which were to be carried out in discharge of his duty, was completed three days prior to 20/10/2014.

Accused nos.4 and 5 have also denied the prosecution case by filing separate statements. Accused no.5 Narayan Patil has stated that on 20/10/2014, the E-Ward, Byculla office was very crowded on account of Diwali and since he wanted to obtain signature of Birajdar on a building proposal, he visited his office between 3.30 to 4.00 p.m, when he was told by Mr.Birajdar that he was headed out of station and he will sign the file later on. He handed over a packet of sweets on account of Diwali, which he accepted. On his instructions, he picked up the sweet box which was wrapped in the packet and came out of the cabin but returned after a while when he received phone call from the office of ACB from the telephone of Mr.Birajdar. Accused no.4 – Satish Palav has also denied the case of the prosecution by specifically taking a stand that he has been falsely implicated in the case and the complainant handed over a cloth bag on the pretext that it contained certain documents and he was unaware that it contained money.

28 The accused nos.1, 2 and 3 have set up a defence of malicious prosecution on account of the redevelopment project to be undertaken by the Company/firm belonging to PW 1 and PW 2. The defence is that the duo were desirous

of the BMC declaring said building as dilapidated/dangerous. However, since the proposal was not in accordance with the Rules and Regulations of BMC and the building could not be treated as dilapidated, it was categorized as 'repairable'. If the building was declared as dilapidated M/s.Tirupati Developer would have been allowed FSI of 2.5 but since it was not, the available FSI was scaled down to 1.33, resulting into loss of crores of rupees to the developer. The effort of accused nos.1, 2 and 3 is projected as saving the BMC of wrongful loss running into crores of rupees and frustrating the efforts on part of the Tirupati Developers. The Defence has placed reliance on a list of certified copies of documents which was exhibited as Exhibit-82 which include 14 documents. The Public Prosecutor accorded his No Objection for exhibiting the said documents as they are collected by the Investigating Officer during the course of investigation and are filed on record at the time of filing of charge-sheet in form of File Nos. A-2, A-3, A-4. The list include the following documents :-

- (1) *Proposal dt. 05/02/2014 submitted by M/s.Shree Tirupati Developer to MCGM.*
- (2) *Proposal referred by Accused No.2 on 07/02/2014 to C.F.O. Mumbai.*
- (3) *Proposal referred by Accused No.2 E.E. (T & C) for NOC on 07/02/2014*
- (4) *NOC received from CFO on 01/03/2014.*

- (5) *NOC received from E.E. (T & C) on 03/03/2014.*
- (6) *Minutes of the meeting prepared on 07.08/2014 held in the chamber of Hon'ble M.C. on 16/07/2014 to take decision on Heritage issues. Where redevelopment proposal are submitted.*
- (7) *Proposal submitted by Accused No.1, 2 and 3 for the approval of Hon'ble M.C with the following signatures with dates.*
 - (a) *Sub Engineer on 06/08/2014.*
 - (b) *Asstt. Engineer on 07/08/2014.*
 - (c) *Ex. Engineer on 07/08/2014*
- (8) *Hon'ble M.C's approval for concession for the proposal received on 05/09/2014 and receipt of the file by the building proposal office on 12/09/2014.*
- (9) *Premium payable by the developer for redevelopment project workout by Sub Engineer i.e. Accused No.2 on 29/09/2014.*
- (10) *Draft IOD prepared by Sub Engineer (i.e. Accused No.2) on 29/09/2014 signed by Asstt. Engineer (i.e. Accused No.1) on 10/10/2014 and also approved by Ex. Engineer (i.e. Accused no.3) on 10/10/2014.*
- (11) *Four receipts showing payments of the premium amount to MCGM by developer on 16/10/2014.*
- (12) *Office copy (O.C) of the IOD with the following officers signature.*
 - a) *Sub Engineer (i.e. Accused No.2) on 17/10/2014*
 - b) *Asstt. Engineer (i.e. Accused No.1) on 17/10/2014.*
 - c) *Ex. Engineer (i.e. Accused No.3) on 17/10/2014.*
- (13) *Copies of plans submitted by developer to building proposal office on 20/10/2014.*
- (14) *IOD issued by Accused No.1 and 2 on 20/10/2014.*

29 Accordingly, on the say of Public Prosecutor, the documents came to be exhibited. The prosecution witnesses were cross-examined on the basis of the said documents and

the relevant material extracted from the prosecution witnesses, can be crystallized in the subsequent paragraphs.

PW 1 Kudalkar gave the following admission :-

“It is true that myself and Raje are partners of three construction companies i.e. 1. M/s.Guru Mauli Developers 2. M/s.Shri Siddhi Developers and 3. M/s.Shri Tirupati Developers. I cannot tell what does the issue regarding IODs of the company was, I cannot tell that the issues regarding IODs of this company were also pending with BMC at that time. I do not know that BMC had demanded the premium amount with us as worked out by BMC for issuing the said IOD. It is true to suggest that myself and my partner Mr.Raje, we were making efforts to get concessions in same also. It is true that myself and Mr.Raje were making efforts by visiting various concerned departments to see that we could get IOD without paying the premium amount which could be paid at the time of application for occupancy certificate of respective projects. (witness volunteered under the instruction of "under the instructions of Architect"). It is true that concerned department of BMC was not eager to consider our request. Copy of the same letter dated 18.12.2014 now shown as handed over to him is the same letter by which we made efforts by addressing it to the Commissioner. A copy is marked as Article 'X' for identification 18.12.2014”

30 The letter dated 18th December 2014 is the letter addressed by PW 1 to the Municipal Commissioner to pay the MCGM dues and it read as under :-

*To,
The Municipal Commissioner,
Municipal Corporation of Gr.Mumbai,
Mahapalika Marg, Fort,
Mumbai 400001.*

*Subject : Concession in payment schedule to
pay to MCGM for projects.*

Respected Sir,

We Mr. Jagdish Raje & Mr. Dilip Kudalkar, partners of M/s. Gurumauli Developer M/s. Shree Siddhi Developer and M/s. Shree Tirupati Developer, wish to bring to your notice that due to amendments in the rules related to open space as per the order of Hon'ble Supreme Court, there has been amendments in plans, resulting is subsequent delay in execution of our projects mentioned above. The tenure of project completion has increased and we have to pay additional rents to members & other charges related to project causing additional financial burden on our project expenses.

In this regard we request you to grant us concessions to pay the MCGM dues related to Staircase Premium, Development Charges, Premium for Fungible FSI, Labour Welfare Cess, Premium for deficiency in open space & Premium for parking deficiency etc. which arise at stage of plan approval & Commencement Certificate. We will pay the same at the time of application for Occupancy Certificate of the respective projects mentioned below.

We are ready to pay these payments along with applicable interest as shall be demanded by MCGM.

31 The defence of accused nos.1 to 3 is that the process which was to be followed for grant of IOD was adhered to and the following events and dates described as the Milestones which were attained at various stages.

- a. *IOD was already ready on 29.9.2014.*
- b. *Premium payable by the developer (company of PW1 and 2) was worked out by Accused No.2 Shri Birajdar on 29.9.2014*
- c. *The draft of the IOD was already prepared by Accused No.2 and duly signed by Accused No.1 and 3 on 10.10.2014.*
- d. *Payment of premium which is condition precedent for the issue of IOD was for the first time paid on 16.10.2014 and never before (This is the matter of record)*
- e. *Office copy of IOD was ready and signed on 17.10.2014.*
- f. *The accused No.1 and 2 were waiting for PW1 and 2 to submit the 7 copies of plans before the issued final IOD could be issued.*

32 PW 10 – the Investigating Officer has colated all these documents during the course of investigation and in paragraph no.35 of his deposition, he admit as under :-

“It is true that I had taken into possession the file of IOD of Tirupati Developers during the course of investigation and I had taken Xerox copies of all the documents containing in such file and returned the 5 original file to the MCGM office. It is true that the documents 1 to 14 mentioned in application Ex-82 filed by the accused contains in the Xerox copies of all the documents containing in such file and the entire Xerox copies of all the documents containing in such file are O filled along with charge-sheet at File No.A-2, A-3, A-4 (Article AB (colly)). The documents filed vide Ex-82 are at Ex-83 (colly) to Ex-96 (colly). The file A-2 to A-4 (Article AB (colly) are marked as Ex-97 (colly) to Ex-99 (Colly)

33 On the documents filed vide Exhibit-82 and 83 (colly) to Exhibit-96 (colly), coupled with the evidence of PW 10 bring on record that the premium payable by the developer (PW 1 and PW 2) was worked out by accused no.2 Birajdar on 29th September 2014. The draft of the IOD came to be prepared by him and duly signed by Accused nos.1 and 3 on 10th October 2014. The payment of premium, which is a condition precedent for issuance of IOD was tendered by the Developer on 16th October 2014. The office copy of the IOD was made ready, being signed on 17th October 2014. Before issuance of IOD, it was imperative for the developer to submit 7 copies of plans and awaiting the plans, the IOD was not released. On 20th October 2014, the required 7 copies of the plans were submitted in the office of the BMC and in the morning, the final IOD was issued, signed by Accused nos.1 and 2 and was forwarded to despatch section. The IOD was collected from the despatch section by representative of PW 1/PW 2 on the same day i.e. 20th October 2014.

The sequence of events which is unfolded through the exhibited documents and the originals of which are taken into possession by the Investigating Officer, make the case of the prosecution improbable, being bribe was demanded for issuance of IOD. If it was so, the steps which are taken prior

to the dates when the complainant approached the ACB i.e. on 10/10/2014, would have been delayed, but this is not the case. Since payment of premium was a condition precedent for issuance of IOD and it was tendered on 16/10/2014, which is admitted by PW 1, it could not be said that there was any delay in issuance of IOD and the Accused nos.1, 2 and 3 had withheld the same for want of bribe amount.

34 An important aspect of the matter is, if the demand was to be verified on various dates, PW 1 and 2 were not ready with the money to be offered as bribe amount until 20th October 2014. If the verification of demand was completed on 10th October 2014, the prosecution failed to offer any plausible explanation as to why the bribe amount was carried only on 20th October 2014 when the accused persons are alleged to have visited the office of BMC on earlier dates. On all the previous dates, when the trap was laid and PW 10 had instructed PW 1 and 2 to accompany the panch witness, when the conversation could be heard by them about the demand of bribe, PW 1 and PW 2, in utter ignorance of the instructions proceeded to the office of the accused persons without taking the panch witnesses along and it is also not known as to what permitted PW 1 to take PW 9 with him knowing surely well that the trap is going to

be a success, though on previous three dates, the demand could not be verified. On this date, in the second half, when the raiding team visited the office of the accused persons, on second occasion, PW 2 conspicuously did not accompany PW 1 and it is deposed by him that he preferred to stay near the vehicle.

35 I have carefully scanned the evidence to establish the success of trap on 20/10/2014 in the second half of the day. If the evidence in support of the successful trap on the second visit of the raiding team on 20th October 2014 is perused, there is no material to establish the demand by the accused persons, as the version of PW 1 is that he along with accused no.4 entered the cabin of Birajdar (Accused no.2) and had a discussion with him. PW 1 specifically deposes that he told Accused no.2 that he has brought the bribe amount demanded by him and handed over it to him. His version is not corroborated by the panch witness PW 9, who accompanied him on his visit to the office of the accused persons. The version of PW 1 is that he entered the cabin of Birajdar and the panch witness continued to stand near him and the panch deposed that some discussion took place between the two regarding work. The panch, however, do not corroborate the demand by Birajdar to the complainant

but his version is that PW 1 took out the bribe amount from red bag and gave it to Birajdar, who accepted the red bag and kept it in the drawer no.2 of his office table. Thereafter, as per PW 1, they came near the cabin of Accused no.1 Khillari, where he and the panch stood in the door whereas Palav went inside and informed Khillari that the money was brought. PW 1 state that he did not enter the cabin as some people were sitting in front of Khillari. This version also calls for corroboration and, therefore, PW 9 entered the witness box, who state that Palav entered in the chamber of Khillari and came out within two minutes and asked PW 1 to hand over the amount of Rs.10 lakhs, which was accordingly handed over. There is no demand at the instance of the said accused and only because the amount is recovered, do not amount to the trap being successful.

36 In case of both accused persons, the demand as alleged for issuance of IOD is not established by prosecution. On the previous dates, when the trap was laid, it was unsuccessful as the demand could not be verified. On the last attempt, on 20/10/2014, when the prosecution state that the demand is established and pursuant to which the bribe amount was accepted by the accused persons, there is conspicuous absence of demand by either accused nos.1 or

accused no.2. Pertinent to note that there is no demand established by the prosecution at the instance of accused no.1 and in fact, no direct contact is established between PW 1 and Khillari since other people were sitting in his cabin nor PW 9 – the panch witness speak of any demand. Khillari was handed over the amount through Palav and not by complainant himself.

The inconsistency in the prosecution case, particularly when it is settled position of law that mere acceptance of amount do not establish the offence under Section 7, unless the demand is proved. The PW 1 has admitted in his cross-examination that neither he nor his partner Mr.Raje (PW 2) raised any grievance about the illegal demand raised and satisfied by them at the instance of Accused no.3 Rathod. In the cross-examination, PW 1 admit that this was for the reason that if the amount would not have been paid, it would have created hurdle in the project. The entire episode of the earlier demand is an omission and in the cross-examination, PW 1 admit that he cannot assign any reason why the facts are not appearing in the written complaint as well as the statement recorded on 21st October 2014. It is surprising that if the amount of Rs.25 lakhs was demanded, paid and accepted by accused no.3, the

complainant missed to mention it on both these occasions and depose it in detail before this Court.

37 In order to prove the demand, apart from the testimony of the complainant and the panch witnesses accompanying him, prosecution rely upon the transcript of the conversation prepared by the Investigating Officer which was recorded when the trap was laid. PW 4 – Priya Wadkar is a witness who formatted the Digital Video Recorder and inserted a Micro SD card every time when the trap was planned. She has repeated the procedure on 10/10/2014, 16/10/2014, 17/10/2014, 18/10/2014 and 20/10/2014.

38 In cross-examination, PW 4 admit that she used total 9 micro SD cards in the entire process and one or two DVRs were used. She do not remember the Serial numbers of Micro SD Cards and in her statement on 24th November 2014 she state that she was not able to gather the serial number of the Micro SD cards as they were in a sealed condition. PW 4 categorically admit to the following effect :

“I cannot tell as to which DVR I have used on 10, 16, 17th, 18th, and 20th October 2014. I do not have any documentary record to show as to which DVR was used on 10, 16, 17, 18 and 20th October 2014. It is true to suggest that DVRs in

question remain in custody of Technical Branch of the office i.e. Mr.Avare, ACP. I do not have any documents to show that DVR of particular Sr. No. was handed over to me on any of the above dates. The serial numbers of the DVR are very important on the point of identification of the same”.

39 PW 4 has issued a certificate under Section 65-B of the Evidence Act in relation to the Micro SD card and the said certificate read as under :-

- “1. The Micro SD card titled “recorded conversation at the time of Verification Panchnama on 10th October 2014, 16th October 2014, 17th October 2014, 18th October 2014. Pre-trap and Trap panchnama created on 20th October 2014 and Voice Specimen Panchnama of Complainant on 5th November 2014 in ACB CR No. 74/2014 u/s.7, 12, 13(1)(d) r/w 13(2) PC Act, 1988 contains conversation recorded in the micro SD card with the help of Digital Voice Recorded being operated by me.*
- 2 The said conversation is recorded into micro SD card during the period over which the Digital Voice Recorded is used regularly to record and listen conversation for the purposes of activities regularly carried on over that period by trained persons.*
- 3 During the said period, information of the kind contained in the electronic record was regularly recorded with the help of Digital Voice Recorded in the Micro SD card in the ordinary course of the said activities.*
- 4 Throughout the material part of the said period, the Digital Voice Recorded was operating properly.*
- 5 The relevant conversation referred to above is appropriately recorded in the Micro SD card with the help of Digital Video Recorder”*

40 As far as the said certificate is concerned, she give the following admission.

“It is true to suggest that it is not mentioned in the certificate filed at Exhibit-37 as to which Micro SD card by describing it with identification number was used by me on which date”. The same is the case regarding DVR. It is necessary to mention those serial numbers for identification in the certificate. I cannot assign any reason as to why it is not mentioned in it. It is true that in Exhibit-37, it is no where mentioned as to which Micro SD card was used in which DVR and which DVR was concealed on th person of either Mr.Kudalkar or Mr.Raje on other of the above dates. It was necessary to mention to mention in the certificate as to which Micro SD card with which DVR was concealed on the person of Mr.Raje and on the person of Kudalkar – informant”

41 In light of the said statement, suffering from the technical lacuna, admitted by the witness, PW 4 who issued the 65-B certificate, the recording in form of DVR through SD cards, loses its sanctity since Exh.37 is a cumulative certificate of all the SD cards used for recording of conversation on 10th, 16th, 17th, 18th and 20th October 2014. The exercise qua other SD cards ought to have been undertaken separately, in absentia, the 65-B certificates qua the other SD cards cannot be admitted in evidence.

42 Another interesting admission of PW 4 is to the following effect :-

“While getting prepared the transcript from the recorded conversation, the material which was important from the angle of trap, got transcribed. The entire recorded conversation was heard but only the relevant material got transcribed. It is true to suggest that in getting transcribed the recorded conversation, from start to end, every aspect is required to be included in the transcript. In this case, I have included everything in the transcript which I heard from the recorded conversation. There might be some material in the recorded conversation which I did not mention in the transcript as I was not able to listen to it. This is regarding all the recorded conversations on all the dates. In the recorded conversation dated 17/10/2014, there were some talks which were recorded. But I did not get it transcribed.

43 As far as the transcript of the conversation which took place on 20th October 2014, this witness has given a glaring admission that she took help of Mr.Raje (PW 2) in preparing the transcript. She admit so in para 10 of her deposition.

“Approximately about 15 to 20 minutes after getting the pre determined signal, I had removed the DVR 5 from the person of informant. Informant was found standing near one cabin at that time but I cannot tell as whose cabin it

was. I do not remember now as where was Mr. Raje at that time. Mr. Raje was found present there. I saw Mr. Raje while getting prepared the transcript. I took help of Mr. Raje in getting prepared it”.

PW 4 also admit that each DVR has its own memory and the DVR in question was having two 2GB memory. She further admits that she had not given the procedure followed by her while transcribing the recorded conversation in the certificate. She also admit that the details of the computer which she had used during the said process is also not mentioned in her certificate. She further admit that, “it is not true to suggest that the certificate in question is regarding only one card and verification and therefore, there is reference of the word ‘card’ and ‘verification’ in the certificate at Exhibit-37”.

The aforesaid admissions of PW 4 demolishes the edifice of the prosecution case based on the transcript from the SD card.

44 The SD card was played before the Court and the voice was recognized by PW 1.

The prosecution has again failed to prove its case that the recorded conversation is between the accused persons on one hand and PW 1 and PW 2 on the other. Exhibit-105

is a letter addressed by the Addl. Commissioner of ACB to the Forensic Science Laboratory, Santacruz, Kalina, from whom the opinion was sought whether the voices of accused nos.1 to 4 match with the specimen voices of respective accused. The ACB also called upon the Director to identify voices of PW 1 and 2 after comparing the same with specimen voice samples of PW 1 and PW 2. Exhibit-7 which is the report of the FSL, however, opine that the questioned voice exhibits are similar to the specimen voice samples of respective accused nos.1 to 3. It do not report conclusively that the voice is the same. Further, specimen voice samples of PW 1 and PW 2 are not at all considered for voice analysis and as such, no opinion identifying the voices of PW 1 and PW 2 are made available by the FSL. Not matching the voices of PW 1 and PW 2 in the recorded conversation, create a huge dent in the case of the prosecution and the transcript qua the voices of PW 1 and PW 2 loses its sanctity. If the evidence in form of the recorded conversation is to be believed, the prosecution ought to have conclusively established the conversation between PW 1 and PW 2 and the accused nos.1 to 3 for establishing the demand.

The conversation which is made available to the Court which is alleged to be the one recorded during the

course of trap, also contain number of unidentified voices. PW 10 has made no efforts to identify these voices or to find out what is the exact nature of conversation going on as PW 1 has categorically deposed that on the actual date of trap i.e. on 20th October 2014, there were several persons sitting in the cabin of Accused no.2. The failure on part of the Investigating Officer to throw any light upon the voices heard in the conversation, create a doubt in the case of the prosecution.

45 The charge framed against Accused nos.1 and 2 is for the offence punishable under Section 7 and 13(1)(d) read with Section 13(2) of the P.C. Act, while the charge framed against Accused no.3 is under Section 12 of the P.C. Act., admittedly he do not face charge under Section 7 and 13. The prosecution has failed to establish the demand of bribe either by Accused nos.1 and 2 on 10/10/2014, 16/10/2014, 18/10/2014 and in the cross-examination, PW 1 and 2 have admitted that on 18/10/2014, there was no demand of bribe by any of the staff members.

The prosecution case admittedly is that the trap for verification of the demand was laid on 10/10/2014, 16/10/2014, 17/10/2014, 18/10/2014 and in two sessions, i.e. on 20/10/2014. As far as the trap on 10/10/2014 is

concerned, it is laid when the complaint was lodged by PW 1 with the ACB and to verify the demand, two panchas – PW 6 and PW 9 were called by the Investigating Officer. However, the shadow panch - PW 6 who was asked to accompany PW 1 did not accompany him and therefore, the demand is not established. Transcript of the incident dated 10/10/2014 reveal that it was PW 1 who initiated the talks of bribe, but it do not record demand at the instance of A1.

Moving further to the trap dated 16/10/2014, though PW 6 and PW 9 were to act as shadow panchas, on this occasion also, PW 1 and PW 2 visited the third floor office with DVR concealed on their persons, but PW 6 – the panch kept waiting in the car. Resultantly, there is no corroboration to the version of PW 1 and PW 2 that Accused no.1 reiterated the demand for himself and for A2 and when PW 2 expressed his inability to pay such huge amount of demand and offered to pay half of it, A1 is alleged to have responded that it is only A2, who can respond. This allegation of demand is again uncorroborated and only the interested witnesses PW 1 and PW 2 talk of the demand. The transcript record that at this time also, PW 2 initiated the talks of bribe and there is no reference to demand from the accused.

On 17/10/2014, when PW 1 and 2 visited the office once again, PW 6 followed them by maintaining distance but they could not meet the accused and therefore, they were compelled to leave.

On 18/10/2014, the panchas were again called for verification of demand. This time PW 1 and PW 2 proceeded to third floor office of BMC with PW 6 following them. PW 1 and PW 2 entered cabin of A3 and some discussion took place about the PIL. Accused no.1 is alleged to be present. Thereafter, PW 1 and PW 2 proceeded to the cabin of Accused no.2 - Birajdar with PW 6 following them, and Accused no.2 was asked to reduce the amount and he replied "as you wish". PW 6 i.e. panch who was accompanying, however, contradicts the version of PW 1 and PW 2, and he has deposed that while they entered the cabin of A3 - Rathod, he kept waiting and after one hour, they came out and they returned to the place where the vehicle was parked. PW 6 do not corroborate PW 1 and 2 as to what transpired in the cabin. On this occasion also, the transcript reveal that PW 2 initiated the talks of bribe but there is no demand at the instance of Accused nos.1 and 2. The demand, therefore, is not verified on this date also.

46 On 20/10/2014, PW 1, PW 2 and this time, panch witness PW 9 approached the BMC office. Others followed them at a distance. PW 1 and PW 2 entered the cabin of Rathod but PW 9 was waiting outside the cabin. The prosecution case is that thereafter, Accused no.3 called Accused nos.1 and 2 and they were told to accept the amount and issue IOD on the very same day. Contrary to this version, PW 9 deposed that he has deposed that he was waiting outside the cabin of Rathod and after half an hour, PW 1 and 2 came outside the cabin, but he do not mention that Accused no.1 was also along with them nor did he hear any conversation. PW 9 did not witness what transpired inside the cabin of Rathod. PW 10 – Investigating Officer who was also present on the third floor do not mention about Accused no.1 – Khillari coming out of the cabin of Rathod (Accused No.2) along with PW 1 and PW 2. Transcript also do not support the version of PW 1 and 2.

47 The most relevant part of the prosecution case is the post-lunch trap where the prosecution assert that bribe was accepted by Accused nos.1 and 2. PW 2 did not participate in this part of raid. PW 1 and 9 proceeded to

third floor and others were directed to follow them by keeping distance. The case of the prosecution suffer from material inconsistencies as different versions are coming through PW 1, PW 9-the panch witness and PW 10 who himself was the part of the raiding team and waiting outside the cabin of Accused nos.1 and 2. The prosecution has miserably failed to establish that the money was offered by PW 1 on being demanded by Accused nos.1 and 2, particularly when on the earlier dates the demand was not at all verified. Transcript of the recording of this part of trap do not record any conversation between PW 1 and A2. The transcript also do not record any conversation between Khillari and Palav in support of the case of the prosecution that Khillari asked Palav to accept the demanded money on his behalf. On the other hand, PW 1 is found insisting Palav to take the demanded money to Khillari (A1) who was consistently refusing. The transcript record the complainant saying “ हे घ्या, तुम्हीच घेऊन जा ना, इकडूनच घेऊन जा ना. Palav saying, “..मी माझं घेऊन जाणार”. The transcript therefore, do not support the case of the prosecution.

48 The inconsistencies in the version of the prosecution witnesses are not in form of mere marginal

variation but the inconsistencies and the omissions which amount to contradictions in material particulars go to the root of the case and materially affect the case of the prosecution. The version of PW 1 and PW 2 which itself is full of inconsistencies and the version of complainant read with the version of PW 6 and PW 9 who were assigned the task of following the complainant to verify the demand, make the case of the prosecution doubtful and render the testimony of PW 1/complainant, liable to be discredited.

49 The conviction of Accused no.3 is under Section 12 of the P.C. Act, as he is charged for abetment of the offence. The charge framed against Accused no.3 is to the effect that he abetted Accused nos.1 and 2 in commission of the said offence by threatening the complainant to comply with the aforesaid demand or face the consequences in future. He is further charged for giving guarantee indirectly of performance of job of complainant on satisfaction of illegal demand and thereby committing an offence punishable under Section 12. The implication of these accused is only to the aforesaid extent when PW 1 with PW 2 has visited his chamber and mentioned about the bribe demanded by Accused nos.1 and 2.

Abetment of a thing is defined in Section 107 of IPC to mean instigating a person to do that thing; or engaging with one or more person in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or intentionally aiding by any act or illegal omission, the doing of that thing. The necessary ingredient of Section 107 being instigation, intentionally aiding or engaging in conspiracy for the doing of a particular thing. It is facilitating the commission of that act would also amount to abetment, but the aforesaid deposition of PW 1 do not reflect either of the aforesaid elements so as to bring the alleged act of Mr.Rathod within the purview of the abetment. Further, if the case against accused nos.1 and 2 for making a demand and accepting the demand fail, the Accused no.3 cannot be convicted for abetment of the offence committed by Accused nos.1 and 2. Accused no.3 has also taken a specific stand while being examined under Section 313 of the Code of Criminal Procedure and have demonstrated his case about the IOD which was required by PW 1 and 2 and that the IOD was made ready on 17th October 2014 itself, whereas the alleged demand is of 20/10/2014.

50 As far as Accused no.5 Mr.Patil is concerned, he is also convicted under Section 12 of the P.C. Act and sentenced to three years. The prosecution case as against Accused no.5 is that after the bribe money was paid by PW 1 to Accused no.2 and before the trap was sprung by the ACB, Accused no.2 had handed over the bribe money to Accused no.5 so as to remove from the office. The submission of learned counsel that if the Accused no.2 is acquitted, the Accused no.5 cannot be convicted. The said Accused is also assigned the role of an abettor, which failed to live upto the ingredients of Section 107 of IPC being an affence of abetment. In his statement under Section 313 of Cr.P.C, he has admitted that he was employed as an Assistant in the Architecture firm and he had gone in the BMC office in connection with his office work and was waiting in the cabin of Accused no.2 for a signature on file. He has pleaded a specific case of Accused no.2 handing over a packet of sweets to him since he was to visit his native place by evening train and the sweets, if kept in the office, would go waste. This version is corroborated by PW 1 who state that Accused no.2 called him in the office in the evening on 20th October 2014 since he was leaving for his native place in the evening. A train ticket for the evening

train to Latur was seized from Accused no.2 after the trap. Even accepting the entire evidence of prosecution, Accused no.5 is not attributed any knowledge about the demand of bribe by Accused no.2 from PW 1 and PW 2, and the defence raised by him in his statement appear to be probable.

As far as Accused no.4 is concerned, there is no evidence brought on record by the prosecution attributing any knowledge on his part about the alleged demand and the transcript of the conversation between PW 1 and Accused no.4 at the time when the bribe amount is alleged to have been accepted, clearly reflect the hesitancy on his part to accept the amount to be made over to Accused no.2. Since the case of the prosecution, so far as the demand by Accused no.2 about the bribe amount at the time of trap on 20/10/2014 is not established, the Accused no.4 who is alleged to have accepted the money on behalf of Accused no.2 also stands belied, in the wake of the evidence brought on record during the trial. The charge of abetment of the offence against him is also not proved by the prosecution.

The accused persons have set up their stand while being examined under Section 313 of the Cr.P.C and afforded a circumstance but it was for the prosecution to deal with the same. The cross-examination of the prosecution witness

keeping in mind the stand of the accused persons in their statement recorded under Section 313 of the Cr.P.C has been not even attempted to be rebutted by the prosecution. The prosecution has thus failed to prove its case by cogent and reliable evidence which would hold the appellants guilty of the charge framed.

51 While deciding any case involving the offence under the Anti Corruption Law, one more aspect which is to be borne in mind is that the complainant's evidence has to be scrutinized meticulously, since giving bribe is also an offence, but, then in order to arrest a person who has demanded and then accepting the bribe, testimony of such persons require to be carefully tested. In Panalal Damodar Rathi vs. State of Maharashtra, AIR 1979 SC 1191, it has been held as under :-

“There could be no doubt that the evidence of the complainant should be corroborated in material particulars. After introduction of Section 165-A of the Indian Penal Code making the person who offers bribe guilty of abetment of bribery, the complainant cannot be placed on any better footing than that of an accomplice and corroboration in material particulars connecting the accused with the crime has to be insisted upon.”

The complainant himself is in the nature of

accomplice and his version, *prima facie*, demand a corroboration in material particulars which is conspicuously absent in the case of the prosecution. Demand of gratification cannot be held to be proved only on the basis of complaint filed and the legal position being well settled to the effect that any absence of proof of demand, mere recovery of tainted money from accused, cannot sustain his conviction.

52 Another settled position of law requires a reiteration. As far as the presumption permissible to be drawn under Section 20 of the P.C. Act is concerned, it can only be drawn in respect of offence under Section 7 and not for the offence punishable under Section 13(1)(d)(i)(ii) of the Act. In any event, it is only on proof of acceptance of illegal gratification that a presumption can be drawn. Proof of acceptance of illegal gratification can follow only if there is proof of demand.

The law is well crystallized that demand of illegal gratification is *sine qua non* for the constitution of an offence under the provisions of the Act. It would be useful to refer the observations of the Hon'ble Apex Court in the authoritative pronouncement of State of Maharashtra v. Dnyaneshwar Laxman Rao Wankhede, which read as under :-

“In indisputably, the demand of illegal gratification is a sine qua none for constitution of an offence under the provisions of the Act. For arriving at the conclusion as to whether all the ingredients of an offence, viz. Demand, acceptance and recovery of the amount of illegal gratification have been satisfied or not, the court must take into consideration the facts and circumstances brought on the record in their entirety. For the said purpose, indisputably, the presumptive evidence, as is laid down in section 20 of the Act, must also be taken into consideration but then in respect thereof, it is trite, the standard of burden of proof on the accused vis-a-vis the standard of burden of proof on prosecution would defer. Before, however, the accused is called upon to explain as to how the amount in question was found in his possession, the foundational fact must be established by the prosecution. Even by 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 probabilities and not on the touchstone of proof beyond reasonable doubt.”

The burden to be discharged by prosecution before sustaining a conviction of an accused under the Prevention of Corruption Act is completely absent in the present case. Proof of acceptance of illegal gratification can follow only when there is proof of demand. The same is conspicuously lacking in the present case and the primary facts on the basis

of which presumption under Section 20 of the Act can be drawn are completely amiss. The mere possession and recovery of currency notes from the accused without proof of demand will not establish the offence under Section 7. Further, the same shall be conclusive insofar as the offence under Section 13(1)(d)(i)(ii) is concerned as in the absence of proof of demand for illegal gratification, use of corrupt or illegal means of abuse of position as public servants to obtain any valuable thing or pecuniary advantage, cannot be held to be established. The demand of gratification cannot be said to be proved only on the basis of the allegations levelled in the complaint in absence of the allegations levelled in the complaint in absence of any corroboration to that effect. Mere recovery of tainted money from the accused in absence of proof of demand is not sufficient to sustain the conviction. The three cardinal principles of criminal jurisprudence are well settled and in case of Rabindra Kumar Dey Vs. State of Orissa, AIR 1977 SC 170, they are highlighted as under :-

- (i) *that the onus lies affirmatively on the prosecution to prove its case beyond reasonable doubt and it cannot derive any benefit from weakness or falsity of the defence version while proving its case;*
- (ii) *that in a criminal trial, the accused must be presumed to be innocent unless proved to be guilty; and*
- (iii) *that the onus of the prosecution never shifts.*

Merely because of the existence of presumption under Section 20, the burden does not shift on the accused. The Evidence Act do not contemplate that the accused should prove the case with the same strictness and rigor as the prosecution is required to prove a criminal charge and it is sufficient if the accused is able to prove his case by standard of preponderance of probabilities as envisaged under Section 5 of the Evidence Act as a result of which he succeeds not because he proves his case to the hilt but because probability of the version given by him throws doubt on the prosecution case and, therefore, the prosecution cannot be said to have established the charge beyond reasonable doubt. Once the accused gives a reasonable and probable explanation, it is for the prosecution to prove affirmatively that the explanation is false. In criminal trial, it is not at all obligatory on the accused to produce evidence in support of its defence and for the purpose of proving his version, he can rely on the admissions given by prosecution witness or documents filed by the prosecution. The prosecution has to stand on its own legs, and if it fails to prove its case beyond reasonable doubt, the entire edifice of the prosecution case would crumble down.

53 The impugned judgment fails to consider the conspectus of the accusations faced by the five appellants and the learned Judge who has determined 9 points for determination has perfunctorily referred to the evidence placed on record. Without appreciating the evidence, the learned Judge has answered the points in the affirmative. From the notes of arguments placed before the learned Judge, it can be seen that comprehensive and extensive arguments were advanced on behalf of the accused persons, but unfortunately the whole exercise is in vain as the impugned judgment without even touching the evidence on record, record a finding that the prosecution is successful in proving the charge that Accused nos.1 and 2 have obtained pecuniary advantage to the tune of Rs.10 lakhs and Rs.5 lakhs respectively. In a very perfunctory manner, the case laws which have been cited before the learned Judge have been held to be applicable to the present facts and circumstances of the case. The exercise which ought to have been taken by the learned Judge is required to be taken at this appellate stage and since it is permissible for this Court to re-appreciate the evidence brought on record, in exercise of its appellate powers, I was constrained to refer to the entire evidence afresh since the Special Judge did not delve into the evidence

nor did not he appreciate the same, as a Court of first instance who was duty bound to scrutinize the evidence before arriving at a finding of guilt.

54 The impugned judgment being perverse, since it is not based on the evidence brought on record, cannot be sustained and is liable to be quashed and set aside.

The five appellants in four Appeals deserve an acquittal, on appreciation of the evidence and they stand acquitted of the charges framed against them by allowing their respective Appeals. Hence, the following order :-

ORDER

Appeals are allowed.

Judgment and order of Conviction dated 18th August 2018 by the Special Judge in Special Case No. 60 of 2015 is set aside.

All the aforesaid appellants are acquitted of the charge framed against him. Bail bonds stand cancelled.

(SMT.BHARATI DANGRE,J)