

IN THE HIGH COURT OF ORISSA, CUTTACK

GCRLA No. 13 of 2016

An appeal under section 378 of the Code of Criminal Procedure from the judgment and order dated 22.09.2009 passed by Additional Special Judge (Vigilance), Bhubaneswar in T.R. No.16 of 1997.

State of Odisha
(G.A. Vigilance)

Appellant

-Versus-

Rabinarayan Patra

Respondent

For Appellant :

Mr. Sangram Das
Standing Counsel (Vig.)

For Respondent:

Mr. Sobhan Panigrahi
Advocate

P R E S E N T :

THE HON'BLE MR. JUSTICE S.K. SAHOO

Date of Hearing: 15.09.2022

Date of Judgment: 12.10.2022

S.K. SAHOO, J. The respondent Rabinarayan Patra faced trial in the Court of learned Additional Special Judge (Vigilance), Bhubaneswar in T.R. No.16 of 1997 for offences punishable under section 7 and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereafter 'P.C. Act') on

the accusation that on 30.06.1993 he being employed as a Junior Clerk in the office of the Sub-Registrar, Sakhigopal and being a public servant accepted for himself illegal gratification amounting to Rs.200/- (rupees two hundred) other than legal remuneration and also accepted for himself gratification of Rs.500/- (rupees five hundred) other than the legal remuneration on 03.07.1993 from Sudarsan Behera (P.W.5) as a motive and reward for delivering two sale deeds to him and thus by corrupt and illegal means obtained for himself the gratification money at his office as pecuniary advantage by abusing his official position as such public servant without any public interest.

The learned trial Court vide impugned judgment and order dated 22.09.2009 has been pleased to hold that the investigation having been done by the trap laying officer who is an interested witness for the prosecution, the prosecution case is susceptible to reasonable doubt and accordingly held the respondent not guilty and acquitted him of all the charges.

The State of Odisha, G.A Vigilance has preferred this appeal challenging the aforesaid judgment and order of acquittal.

2. The prosecution case, as per the first information report lodged by Sudarsan Behera (P.W.5) of village Bira Ramachandrapur is that his brother-in-law Dhruba Charan

Behera purchased two plots from Sasimani Jena and Dibakar Jena (P.W.2) by executing two separate sale deeds vide sale deed nos.849 and 850 in the office of Sub-Registrar, Sakhigopal after depositing all the required fees as per law and the vendors of both the sale deeds gave the receipts to P.W.5 to obtain the sale deeds from the office of the Sub-Registrar. As the sale deeds were to be delivered to the vendee within two to three days of its registration, on 30.06.1993 P.W.5 met the respondent who was the Junior Clerk in the office of the Sub-Registrar, Sakhigopal in his office and asked him to deliver the sale deeds, but the respondent demanded illegal gratification of Rs.2,200/- (rupees two thousand two hundred) from P.W.5 and told that if he would not pay such amount, both the sale deeds would be objected for registration on the ground of under-valuation for which P.W.5 shall have to pay an excess amount of Rs.4,500/- (rupees four thousand five hundred). Being apprehensive of under-valuation, P.W.5 agreed to give Rs.500/- to the respondent as gratification against his will, but the respondent did not agree to it and threatened to send the sale deeds for under-valuation on the same day. However, after much persuasion of P.W.5, the respondent asked P.W.5 to give him Rs.1,200/- (rupees one thousand two hundred). P.W.5 paid Rs.200/- to the respondent

in advance as gratification instantly and further assured the respondent to give the balance of Rs.1,000/- (rupees one thousand) within ten days against his will. P.W.5 then met the respondent on 02.07.1993 in the office of Sub-Registrar, Sakhigopal and expressed his inability in arranging the money and requested him to take Rs.500/- (rupees five hundred) and to hand over both the sale deeds to him, however the respondent did not pay any heed to the request of P.W.5 and got annoyed and insisted for payment of Rs.1,000/- (rupees one thousand). Finding no way out, P.W.5 told the respondent that he would arrange Rs.500/- (rupees five hundred) and give the same to him on 03.07.1993 in the afternoon and the balance amount of Rs.500/- (rupees five hundred) would be paid within five days thereafter for taking the sale deeds. P.W.5 requested the respondent not to under-value the sale deeds to which the respondent agreed. P.W.5 reported in writing the matter to the Superintendent of Police, Vigilance, Cuttack on 02.07.1993 for taking necessary action against the respondent.

On the basis of such first information report, the Superintendent of Police, Vigilance, Cuttack directed the officer in charge of the Vigilance Police Station, Cuttack to register a case and accordingly, Cuttack Vigilance P.S. Case No.34 dated

02.07.1993 was registered on under section 13(2) read with section 13(1)(d) and section 7 of the P.C. Act and Sri U. Rama Rao, Inspector of Vigilance, Cuttack was directed to lay a trap for detection of the case against the respondent and to take up investigation of the case.

Sri U. Rama Rao, Inspector of Vigilance, Cuttack laid a trap and after preparation in the Vigilance Office, Puri, the trap party proceeded to Sub-Registrar's Office, Sakhigopal along with P.W.5 and two official witnesses, out of which one was the overhearing witness Siva Narayan Acharya (P.W.4) and the other was Sanat Kumar Pattanayak (P.W.6). After the respondent demanded and received the tainted money from P.W.5, P.W.4 passed signal to the raiding party who rushed to the spot and apprehended the respondent and his hand washes was taken. The tainted money was recovered from the table of the respondent which was covered by some blank challan form and the number and denomination of the tainted currency notes tallied with the number and denomination of the tainted notes mentioned in the preparation report. Thereafter, the solution bottles, tainted money, four fold white paper and copy of the preparation report were seized by the Inspector of Vigilance, Cuttack at the spot and finally a detection report was prepared

and also the original sale deeds were seized from the office of Sub-Registrar. The brass seal used in sealing the bottles was given in zima of P.W.6 with a direction to produce the same before the Court as and when required and on completion of investigation, charge sheet was submitted on 24.08.1994 against the respondent under section 7 and section 13(2) read with section 13(1)(d) of the P.C. Act.

3. The defence plea of the respondent is one of denial. It is pleaded that on the relevant date and time of occurrence, while he was talking with staff, namely, Khageswar Sahu and Guru Charan Das, four to five persons entered inside the office of Sub-Registrar and caught hold of both his hands and told him to count some money and thereafter, took his hand washes. The respondent denied to have demanded or accepted any bribe money from P.W.5.

4. During course of trial, in order to prove its case, the prosecution examined seven witnesses.

P.W.1 Bijay Kumar Nand was the Additional District Magistrate -cum- District Registrar, Puri, who accorded sanction for prosecution of the respondent.

P.W.2 Dibakar Jena is one of the vendors, who had sold the land to the brother-in-law of P.W.5 and executed a sale deed on 23.06.1993.

P.W.3 Satyananda Maharana was the Assistant Director of S.F.S.L., Rasulgarh, Bhubaneswar, who examined the exhibits of the case and proved the C.E. Report marked as Ext.3.

P.W.4 Siva Narayan Acharya was working as Junior Clerk in the Office of the C.T.O. Circle-I, Puri who acted as over hearing witness and he accompanied with the raiding party and gave signal to the raiding party after the respondent accepted the tainted money from P.W.5. He is also a witness to the seizure of three bottles, currency notes, two sale deeds and the counter foils of the receipts given to P.W.5 for receiving the sale deeds by the vendees, purse and amount of the respondent, paper of tainted money and the detection report.

P.W.5 Sudarsan Behera is the informant in the case. He supported the prosecution case to a great extent but he was declared hostile.

P.W.6 Sanat Kumar Patnaik was the Addl. C.T.O., Puri and he is a witness to the preparation report (Ext.4) in the Vigilance Office, Puri. He further stated about the recovery of tainted money from the table of the respondent. He verified and

compared the numbers of the currency notes noted in a paper with the numbers of seized tainted money. He further stated about the hand wash of the appellant taken in the sodium carbonate solution to have turned to pink. He also took zima of the brass seal from the I.O. which he produced before the learned trial Court. He further stated that as the respondent had held the currency notes in his right hand, his right hand so also his left hand was washed with liquid solution which turned pink colour. He further stated that after counting of the currency notes, his hand was also washed with liquid solution and it turned pink colour and the pink colour liquid solution were preserved in bottles and sealed and the cash and the solution bottles were also sealed at the spot.

P.W.7 Sarat Kumar Paramguru was the Inspector, Vigilance, Cuttack Division, Cuttack and he was the member of trap party. Inspector U. Rama Rao was the Investigating Officer of the case who on completion of investigation, submitted charge sheet against the respondent, but since he died, P.W.7 proved the entire trap formalities and investigation carried out by Inspector U. Rama Rao.

The prosecution exhibited twenty documents. Ext.1 is the sanction order, Ext.2 is the sale deed, Ext.3 is the C.E.

Report, Ext.4 is the preparation report, Ext.5 is the seizure list relating to bottles, Ext.6 is the seizure list relating to solution bottle, Ext.7 is the seizure list relating to currency notes, Ext.8 is the seizure list relating to two sale deeds and counter foil, Ext.9 is the seizure list relating to purse and amount, Ext.10 is the seizure list relating to paper of tainted money, Ext.11 is the detection report, Ext.12 is the F.I.R., Ext.13 is the seizure list, Exts.14 and 14/1 are the receipts, Exts.15 to 15/4 are the G.C. Notes, Ext.16 is the sale deed, Ext.17 is the four fold paper, Ext.18 is the receipt prepared by U. Rama Rao, Ext.19 is the forwarding report along with signature of U. Rama Rao and Ext.20 is the rough spot map.

The material objects i.e. glass bottles containing some colourless solution whereas the other two are empty have been marked as M.O.I to M.O.V and the brass seal has been marked as M.O.VI on behalf of the prosecution.

The respondent examined one witness as D.W.1, namely, Rama Chandra Sethi, who was peon at Sub-Registrar Office, Sakhigopal and he stated that while he was standing near the seat of the respondent, three to four persons entered inside the office room, caught hold of both the hands of the respondent

to which they protested and they disclosed their identity as Vigilance Officers.

5. The learned trial Court formulated the following two points for determination:-

(i) Whether the accused Sri Patra being a public servant had accepted for himself illegal gratification of Rs.200/- (rupees two hundred) and Rs.500/- (rupees five hundred) on 30.06.1993 and 03.07.1993 respectively from complainant Sudarsan Behera as a motive and reward for delivering two registered sale deeds to him, which was his official act?

(ii) Whether Sri Patra, being a public servant, by corrupt and illegal means had obtained for himself cash of Rs.200/- (rupees two hundred) and Rs.500/- (rupees five hundred) from Sri Behera on 30.06.1993 and 03.07.1993 respectively at his office as pecuniary advantage by abusing position as public servant without any public interest?

6. After analyzing the evidence on record, the learned trial Court has been pleased to hold that there are tell-tale circumstances which do indicate that there must have been a demand and therefore, the circumstances discussed rendered support to the statement of P.W.4 that the demand at the time of visit of P.W.5 to the respondent on 03.07.1993 must be

pursuant to his earlier demand. The learned trial Court observed that after carefully scrutinizing the oral and documentary evidence led by the prosecution as well as the C.E. Report and the defence plea, the prosecution has succeeded to bring home the charges against the respondent under section 7 and section 13(2) read with section 13(1)(d) of the P.C. Act. However, the learned trial Court held that the Vigilance Inspector late U. Rama Rao was the trap laying officer in the vigilance raid and he was also the Investigating Officer and the investigation of the case by the trap laying officer himself is not desirable in as much as there is possibility of tainted investigation in order to boost up a prosecution case, so as to create evidence which may enable the Court to record a conviction. It was further held that the investigation having been done by the trap laying officer who is an interested witness for the prosecution, the prosecution case is susceptible to reasonable doubt and on that ground, the learned trial Court acquitted the respondent of all the charges.

7. Mr. Sangram Das, learned Standing Counsel for the Vigilance Department challenging the impugned judgment and order of acquittal of the respondent contended that the learned trial Court has not properly appreciated the evidences of P.Ws.4, 5 and 7 who are consistent and there is no reason to discard

their evidence. He further urged that P.W.5 in his chief examination has supported the prosecution story in its entirety but in the cross-examination, he has taken the path of prevarication and it is no more res integra that even if a witness is characterized as a hostile witness, his evidence is not completely effaced and such evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence. He further argued that the evidence of P.W.5 has got corroboration from the shadow witness (P.W.4) who in all material particulars has stated about the factum of demand and acceptance of the tainted money by the respondent and its recovery. The evidence of P.W.7, the member of the raiding party also lends support and renders immense assistance in establishing the case of the prosecution case with regard to the factum of recovery of the tainted money from the possession of the respondent. He further argued that the chemical examination report (Ext.3) unequivocally corroborates the trustworthy evidence of P.Ws.4, 5 and 7 and thus, the ocular testimony gets duly corroborated by documentary evidence for which the prosecution has proved its case relating to demand, acceptance and recovery of the tainted money from the respondent to the hilt. He further argued that

the findings of the learned trial Court at paragraph-10 of the impugned judgment that the prosecution has succeeded to bring home the charges against the respondent, neither suffer from any perversity nor can be faulted with. With regard to the findings of the learned trial Court that the investigation having been done by the trap laying officer, the respondent is entitled for acquittal, learned Standing Counsel submitted that in the instant case, though the investigation has been done by the trap laying officer who was a member of the raiding party yet, in fact, nothing has been elicited that he was in anyway personally interested to get the respondent convicted inasmuch as there is no clinching evidence on record to point out any circumstances by which the investigation caused prejudice or was biased against the respondent. He further submitted that the investigation though done by the trap laying officer yet he was not in any way personally interested in the case and there is also nothing on record to indicate any sort of bias in the process of investigation and thus, such findings recorded in para-11 of the impugned judgment are neither defensible nor legally sustainable. He further submitted that the reasonings assigned by the learned trial Court for acquitting the respondent is quite faulty and unreasonable and since the impugned judgment of the

learned trial Court is highly unreasonable and the view taken therein is not sustainable, the same should be set aside and the respondent should be convicted of the offence charged. In support of such contention, he has relied upon the decision of the Hon'ble Supreme Court in the case of **Vinod Kumar -Vrs.- State of Punjab reported in (2015) 3 Supreme Court Cases 220** and **Mukesh Singh and others -Vrs.- State (Narcotic Branch of Delhi) reported in (2020) 79 Orissa Criminal Reports (S.C.) 924.**

Mr. Sobhan Panigrahi, learned counsel for the respondent, on the other hand, supported the impugned judgment and submitted that though the respondent was acquitted, but the learned trial Court after analyzing the evidence available on record came to a conclusion that the prosecution has succeeded in bringing home the charges against the respondent under section 7 and section 13(2) read with section 13(1)(d) of the P.C. Act which is against the weight of the evidence available on record. He further submitted that the prosecution has miserably failed to prove any demand for the alleged illegal gratification and the essential ingredients of the offences both under section 7 and section 13(2) read with section 13(1)(d) of the P.C. Act are conspicuously absent. He

further submitted that P.W.5 is a wholly unreliable witness and the brother-in-law of P.W.5 was also not examined for reasons best known to the prosecution which creates suspicion. He further argued that mere acceptance and recovery of tainted currency notes from an accused without proof of demand would not establish an offence under section 7 as well as section 13(1)(d)(i) & (ii) of the P.C. Act. In the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. The proof of demand is an essential and permeating mandate for an offence under sections 7 and 13 of the P.C. Act. Section 20 of the P.C. Act which permits a presumption to be raised relates to an offence only under section 7 P.C. Act and not to those under section 13(1)(d)(i) & (ii) of the P.C. Act. In absence of proof of demand, legal presumption under section 20 of the P.C. Act would not arise. He further argued that the prosecution miserably failed to establish the proof of demand by the respondent. The investigation by the trap laying officer caused prejudice to the respondent, but the biasness of the I.O. could not be brought on record as he could not be examined on account of his death and therefore, if at this stage almost after

thirty years of the date of occurrence, the order of acquittal is interfered with, it would cause serious miscarriage of justice and therefore, the GCRLA should be dismissed. In support of such contention, he has relied upon the decisions of the Hon'ble Supreme Court in the cases of **Popular Muthiah -Vrs.- State represented by Inspector of Police reported in (2006) 7 Supreme Court Cases 296, Chandrappa and others -Vrs.- State of Karnataka reported in (2007) 4 Supreme Court Cases 415, P. Satyanarayana Murthy -Vrs.- District Inspector of Police, State of Andhra Pradesh reported in (2015) 10 Supreme Court Cases 152, B. Jayaraj -Vrs.- State of A.P. reported in 2014 Criminal Law Journal 2433, K. Shanthamma -Vrs.- State of Telengana reported in (2022) 86 Orissa Criminal Reports (S.C.) 345, Suraj Mal -Vrs.- The State (Delhi Administration) reported in A.I.R. 1979 Supreme Court 1408, State of Delhi -Vrs.- Shri Ram Lohia reported in A.I.R. 1960 Supreme Court 490 and Sat Paul -Vrs.- Delhi Administration reported in A.I.R. 1976 Supreme Court 294.**

8. Adverting to the contentions raised by the learned counsel for both the parties, there is no dispute that the order of acquittal has been passed on the sole ground that investigation

having been done by the trap laying officer who is an interested witness for the prosecution and therefore, the prosecution case is susceptible to reasonable doubt.

In the case of **Vinod Kumar** (supra), the Hon'ble Supreme Court held as follows:-

"30. In the instant case, P.W.8, who was a member of the raiding party had sent the report to the police station and thereafter carried the formal investigation. In fact, nothing has been put to him to elicit that he was anyway personally interested to get the appellant convicted. In our considered view, the decision in **S. Jeevanatham** (Ref: **(2004) 5 Supreme Court Cases 230**) would be squarely applicable to the present case and, accordingly, without any reservation we repel the submission so assiduously urged by Mr. Jain, learned Senior Counsel for the appellant."

In the case of **Mukesh Singh -Vrs.- State (Narcotic Branch of Delhi)** reported in **(2020) 79 Orissa Criminal Reports (SC) 924**, which is a five-Judge Constitution Bench decision constituted to decide the correctness of the ratio laid down in the case of **Mohan Lal -Vrs.- The State of Punjab** reported in **(2018) 17 Supreme Court Cases 627**, it was held that whether the investigation conducted by the concerned

informant was fair investigation or not is always to be decided at the time of trial. The concerned informant/investigator will be cited as a witness and he is always subject to cross-examination. There may be cases in which even the case of the prosecution is not solely based upon the deposition of the informant/informant-cum-investigator but there may be some independent witnesses and/or even the other police witnesses. The testimony of police personnel will be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses, his testimony cannot be relied upon. It has also been held that there is no reason to doubt the credibility of the informant or the entire case of the prosecution solely on the ground that the informant has investigated the case. Solely on the basis of some apprehension or the doubts, the entire prosecution version cannot be discarded and the accused is not to be straightway acquitted unless and until the accused is able to establish and prove the bias and the prejudice. While concluding, it was observed that in a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. It was held that

merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore, on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis. It was held that a contrary decision in the case of **Mohan Lal** (supra) and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled.

Therefore, the sole ground of acquittal of the respondent passed by the learned trial Court is not acceptable. However, the submission of the learned Standing Counsel for the Vigilance Department that in view of the finding of the learned trial Court that the prosecution has succeeded to bring home the charges against the respondent, which does not suffer from any perversity, the respondent should be convicted of the offences charged, requires thorough consideration.

9. The crux of the matter is whether a finding arrived at by the trial Court against an accused in a case of acquittal can be reappreciated and reconsidered where the judgment and order of acquittal has been challenged in an appeal by the State.

In the case of **Popular Muthiah** (supra), the Hon'ble Supreme Court held as follows:-

"27. While exercising its appellate power, the jurisdiction of the High Court although is limited but, in our opinion, there exists a distinction but a significant one being that the High Court can exercise its revisional jurisdiction and/or inherent jurisdiction not only when an application therefor is filed but also suo motu. It is not in dispute that suo motu power can be exercised by the High Court while exercising its revisional jurisdiction. There may not, therefore, be an embargo for the High Court to exercise its extraordinary inherent jurisdiction while exercising other jurisdictions in the matter. Keeping in view the intention of Parliament, while making the new law the emphasis of Parliament being 'a case before the Court' in contradistinction from 'a person who is arrayed as an accused before it' when the High Court is seized with the entire case although would exercise a limited jurisdiction in terms of Section 386 of the Code of Criminal Procedure, the same, in our considered view, cannot be held to limit its other powers and in particular that of Section 482 of the Code of Criminal Procedure in relation to the matter which is not before it."

In the case of **Chandrappa** (supra), the Hon'ble Supreme Court held as follows:-

"42. From the above decisions, in our considered view, the following general principles regarding powers of Appellate Court while dealing with an appeal against an order of acquittal emerge:

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

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

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an Appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasize the reluctance of an Appellate Court to interfere with acquittal than to curtail

the power of the Court to review the evidence and to come to its own conclusion.

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

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

Therefore, the finding of the learned trial Court that the prosecution has succeeded to bring home the charges against the appellant under section 7 and section 13(2) read with section 13(1)(d) of the P.C. Act is not final and this Court can reconsider and reappraise the evidence on record and can reach its own conclusion, both on questions of fact and of law. As

an Appellate Court, there is no limitation, restriction or condition on exercise of power of reconsideration and reappréciation of evidence on record and also the reasoning given by the trial Court. This Court has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage. Once the appeal is entertained against the order of acquittal, the High Court is entitled to re-appreciate the entire evidence independently and come to its own conclusion. An Appellate Court while dealing with an appeal against acquittal passed by the learned trial Court, is required to bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

10. Now, on the basis of the aforesaid rival legal contentions urged on behalf of the parties, the following points would arise for consideration of this Court:-

i) Whether the demand, acceptance and recovery of gratification are proved by the prosecution and whether the presumption of offence alleged to have been committed by the respondent would arise in this case?

ii) Whether the findings and reasons recorded on the charges by the learned trial Court are based on proper appreciation of legal evidence on record and within the legal parameters laid down by the Hon'ble Supreme Court and this Court in its decisions?

11. In a case of this nature, there is no dispute that the prosecution has to successfully prove the foundational facts i.e. the demand, acceptance of bribe money and recovery of the same from the accused and then only the statutory presumption under section 20 of the P.C. Act against the guilt of the accused would arise and the accused has to adduce evidence relating to the rebuttal of such presumption. Demand of illegal gratification is sine qua non for constituting the offence under section 7 and

section 13(2) read with section 13(1)(d) of the P.C. Act. Mere receipt of amount by the accused is not sufficient to fasten the guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Mere recovery of tainted money from the possession of the accused is not sufficient to convict him, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as bribe.

In the case of **P. Satyanarayana Murthy** (supra), the Hon'ble Supreme Court held as follows:-

"23. The proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1)(d)(i) & (ii) of the Act and in absence thereof, unmistakably the charge therefor, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under Section 7 or 13 of the Act would not entail his conviction thereunder.

26. In reiteration of the golden principle which runs through the web of administration of justice in criminal cases, this Court in ***Sujit Biswas -Vrs.- State of Assam : (2013) 12 SCC 406*** had held that suspicion, however grave, cannot take the place of proof and the prosecution cannot afford to rest its case in the realm of "may be" true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmise or conjecture. It was held, that the Court must ensure that miscarriage of justice is avoided and if in the facts and circumstances, two views are plausible, then the benefit of doubt must be given to the accused."

In the case of **B. Jayaraj** (supra), the Hon'ble Supreme Court held as follows:-

"7. Insofar as the offence under Section 7 is concerned, it is a settled position in law that demand of illegal gratification is sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down in several judgments of this Court. By way of illustration reference may be made to the decision in **C.M. Sharma -Vrs.- State of A.P. :**

**(2010) 15 SCC 1 and C.M. Girish Babu
-Vrs.- C.B.I. : (2009) 3 SCC 779.**

8....We are, therefore, inclined to hold that the learned trial Court as well as the High Court was not correct in holding the demand alleged to be made by the accused as proved. The only other material available is the recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by the accused himself. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7. The above also will be conclusive insofar as the offence under Section 13(1)(d)(i)(ii) is concerned as in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established."

In the case of **K. Shanthamma** (supra), the Hon'ble Supreme Court held as follows: -

"7....The offence under Section 7 of the PC Act relating to public servants taking bribe requires a demand of illegal gratification and the acceptance thereof. The proof of demand of bribe by a public servant and its acceptance by him is sine quo non for establishing the offence under Section 7 of the PC Act."

12. Keeping the above principles in view, let me now examine the materials on record to judge whether the prosecution has successfully proved the foundational facts i.e. the demand, acceptance of bribe money voluntarily by the respondent from P.W.5 and recovery of the same from the respondent.

P.W.5, the decoy has stated that his brother-in-law Dhruba Charan Behera had purchased two plots on 23.06.1993 under different sale deeds which were to be registered in the Office of Sub-Registrar, Satyabadi and he was authorized by his brother-in-law to receive the two sale deeds under authorization ticket. He further stated that he came to the Sub-Registrar Office at Satyabadi on 30.06.1993 and approached the respondent and the respondent asked him to pay Rs.4,000/- (rupees four thousand) or else the sale deeds might be undervalued. P.W.5 further stated that he came back and informed the same to his brother-in-law and on the same day, he again came to the Office of the Sub-Registrar with his brother-in-law and approached the respondent and the respondent told them to pay Rs.2,200/- (rupees two thousand two hundred) and to take back the sale deeds and since the respondent compelled them to pay the money, they agreed and paid him Rs.200/- in advance. He

further stated that he came to Vigilance Office at Cuttack on 02.07.1993 and lodged the written report (Ext.12).

The evidence of P.W.5 is contrary to what he has mentioned in the F.I.R. wherein he has stated that the initial demand by the respondent was Rs.2,200/- (rupees two thousand two hundred) and not Rs.4,000/- (rupees four thousand) as stated in his evidence. In the evidence, P.W.5 has stated that the bribe amount was settled at Rs.2,200/- (rupees two thousand two hundred) whereas in the F.I.R., it is mentioned that it was settled at Rs.1,200/- (rupees one thousand two hundred). In the F.I.R., though P.W.5 mentioned that on 02.07.1993 he met the respondent in the Office of Sub-Registrar and told him that he would arrange Rs.500/- (rupees five hundred) and give the same to him on 03.07.1993 in the afternoon and the balance amount of Rs.500/- (rupees five hundred) would be paid within five days thereafter for taking the sale deeds, but no such statement has been made by P.W.5 while deposing in Court.

Though in his evidence, P.W.5 has stated that on 30.06.1993, he approached the respondent in his office for two times and on the second time, his brother-in-law was there with him and the demand amount was settled at Rs.2,200/- (rupees two thousand two hundred) in the presence of his brother-in-law,

but no such thing has been mentioned in the F.I.R. The brother-in-law of P.W.5 has neither been cited as a witness in the charge sheet nor examined in Court and the prosecution has offered no explanation for the same. It cannot be denied that the brother-in-law of P.W.5 is a very vital witness and it is he who had purchased the plots and applied for registration of sale deeds and the demand of bribe was made in that connection. In a criminal trial, the prosecution must act fairly and honestly and must never adopt the device of keeping back the witnesses from the Court only because the evidence is likely to go against the prosecution case. It is the duty of the prosecution to assist the Court in reaching to a proper conclusion in regard to the case which is brought before it for trial. It is no doubt open to the Prosecutor not to examine some witnesses cited in the charge sheet and to make a selection of witnesses, but the selection must be made fairly and honestly and not with a view to suppress inconvenient witnesses from the witness box. If the material witnesses are deliberately kept back and no explanation is offered, the Court may draw an adverse inference against the prosecution and may, in a proper case, record the failure of the prosecution to examine such witnesses as constituting a serious infirmity in the proof of the prosecution case.

It is of course correct that P.W.5 has been declared hostile by the prosecution and the learned Special Public Prosecutor was allowed by the Court to put leading questions and on being confronted with his previous statement, he has admitted to have stated to the I.O. that when the respondent demanded Rs.2,200/-, he (P.W.5) asked him to pay only Rs.1,200/- and that he paid Rs.200/- and Rs.500/- on two different dates and promised to pay the balance amount of Rs.500/- on a subsequent date. In my humble view, such admission cannot be used as substantive evidence in the case.

In the case of **State of Delhi -Vrs.- Shri Ram Lohia reported in A.I.R. 1960 S.C. 490**, it is held as follows:-

"13....Statements recorded under Section 164 of the Code are not substantive evidence in a case and cannot be made use of except to corroborate or contradict the witness. An admission by a witness that a statement of his was recorded under Section 164 of the Code and that what he had stated there was true would not make the entire statement admissible much less that any part of it could be used as substantive evidence in the case."

A statement recorded under section 161 Cr.P.C. is not a substantive piece of evidence. In view of the proviso to sub-section (1) of section 162 Cr.P.C., the statement can be

used only for the limited purpose of contradicting the maker thereof in the manner laid down in the said proviso. Such a statement cannot be treated as evidence in the criminal trial but may be used for the limited purpose of impeaching the credibility of a witness. Therefore, the admission made by P.W.5 with reference to his previous statement made before the I.O. would not make such statement admissible, much less be used as substantive evidence in the case.

In the case of **Sat Paul** (supra), it is held that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the

testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as matter of prudence, discard his evidence in toto.

No doubt, P.W.5 has stated in the chief examination that the respondent demanded bribe from him at two instances prior to the date of trap, but in the cross-examination, he has stated that on 30.06.1993 he was not present when his brother-in-law paid Rs.200/- to the respondent and that the monetary dealing was with his brother-in-law and not with him and even on 02.07.1993 the discussion about the monetary transaction was made with his brother-in-law and not with him. P.W.5 further stated that on 02.07.1993 his brother-in-law came to him at about 12 noon and told him that the respondent was demanding money and doing mischief to give the sale deed and further asked him to approach the vigilance office to give him a lesson. In view of such evidence adduced by P.W.5 in the cross-examination, it can be said that he had no direct knowledge about the alleged demand of bribe money or acceptance of Rs.200/- by the respondent in that connection and since he came to know about the same from his brother-in-law, who has not been examined during trial, the evidence of P.W.5 in that respect is hearsay one and it is not admissible. Section 60 of the

Evidence Act mandates oral evidence must in all cases should be direct, thereafter in the section, direct evidence has been explained that a fact capable of being seen would be relevant only when it is deposed by a witness, who saw it, so is the case with a fact which could be heard or which could be perceived, the emphasis is on the mode by which a fact by whatever can be heard or perceived by any person, only that person's deposition would be treated to be relevant to prove it. Hearsay evidence is that evidence which a witness is merely reporting not what he himself saw or heard, not what has come under the immediate observation of his own bodily senses, but what he had learnt respecting the fact through the medium of a third person. Hearsay, therefore, properly speaking is secondary evidence of any oral statement. What was deposed to by P.W.5 regarding demand and acceptance of bribe money of Rs.200/- by the respondent prior to the date of trap was the information conveyed to him by his brother-in-law would remain hearsay unless the author of the information is examined in the case and is subjected to cross-examination. In the latter contingency, the objection of hearsay would disappear and the Court will have to weigh the relative merits and demerits of the respective versions deposed to by the concerned witnesses.

After carefully analysing the evidence of P.W.5, it is found that he has made inconsistent statements at different stages and therefore, in view of the ratio laid down in the case of **Suraj Mal** (supra) by the Hon'ble Supreme Court, his evidence becomes unreliable and unworthy of credence. Since the prosecution adduced the evidence of P.W.5 only to prove the demand aspect before the date of trap and such evidence is hit by section 60 of the Evidence Act being hearsay in nature and moreover it is full of inconsistent statements, I am of the humble view that the prosecution has miserably failed to prove the demand of bribe made by the respondent before the date of trap.

13. Let me now discuss the evidence adduced by the prosecution as to what happened on the date of trap in the Office of Sub-Registrar, Satyabadi. P.W.4, the overhearing witness has stated that he stayed at the door of the office and was watching the proceeding and another clerk Prasanna Das asked the respondent to return Rs.200/- to P.W.5 saying that he was not interested in making payment and at this P.W.5 told that he had come to make payment of the balance amount and then the respondent asked him to pay the money and P.W.5 then took out the money kept folded in the paper and handed over the same to

the respondent and the respondent counted the money and kept under a paper on his table. In the cross-examination, P.W.4 has stated that on his arrival at Vigilance Office, he reported to the D.S.P., Vigilance and after signing the preparation report (Ext.4), he left the Vigilance Office and did not do any other act. Such a statement made in the cross-examination creates doubt about the presence of P.W.4 in the Office of Sub-Registrar.

P.W.5 has stated that when he approached the respondent in his office, two to four persons were there and the respondent was talking with one or two persons and when he told the respondent that his brother-in-law had sent the money and asked him to give the sale deed, the respondent enquired from him as to who he was and asked him to send his brother-in-law and the respondent did not pay attention to him and engaged in talking with two staff. P.W.5 has further stated that seeing the vigilance staff and the witnesses approaching, he put the money below the files on the table of the respondent. He further stated that the respondent probably had not seen him keeping the money on his table under the files or else he would have forbade him. The Special Public Prosecutor had the freedom and right to put such questions as it deemed necessary in re-examination to elucidate certain answers from P.W.5 to explain

the matters which were brought in the cross-examination and inconsistent with the examination in chief. The same having not been done, the evidence has to be read as a whole and merely because P.W.5 has stated something against the respondent in the chief examination, this Court cannot ignore the materials, which have been brought out in the cross-examination in favour of the respondent and the same goes against the prosecution case of demand and acceptance of bribe money by the respondent from P.W.5.

Thus the evidence of P.W.4 and P.W.5 relating to the demand and acceptance of bribe money on the date of trap is quite contradictory to each other.

P.W.6 is another witness who accompanied the vigilance staff to the Office of Sub-Registrar on the date of trap and though in the chief-examination, he has stated that the table of the respondent was searched and money in question was recovered from below the file, but in the cross-examination, he has stated that he had not seen the recovery of tainted money and the tainted money was given to him by the D.S.P. He has also stated that he had not seen when the respondent had handled the tainted money.

In order to attract the culpability of section 7 of the P.C. Act, the essential ingredients are (i) the person accepting the gratification should be a public servant (ii) he should accept the gratification for himself and the gratification should be as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official function, favour or disfavour to any person. So far as section 13(1)(d) of the P.C. Act is concerned, the prosecution must establish that (i) the respondent as a public servant used corrupt or illegal means or otherwise abused his position as such public servant and (ii) he should have obtained a valuable thing or pecuniary advantage for himself or for any other persons.

In the case of **Kishore Kumar Swain -Vrs.- State of Odisha (Vigilance) reported in (2018) 69 Orissa Criminal Reports 925**, it is held that whether all the ingredients of the offences i.e. demand, acceptance and recovery of illegal gratification have been satisfied or not, the Court must take into consideration the facts and circumstances brought on the record in its entirety and the standard of burden of proof on the accused vis-à-vis the standard of burden of proof on the prosecution would differ. It is only when this initial burden regarding demand and acceptance of illegal gratification is successfully discharged

by the prosecution, then burden of proving the defence shifts upon the accused. The proof of demand of illegal gratification is the gravamen of the offences under sections 7 and 13(1)(d) of the P.C. Act and in absence thereof, the charge would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would not be sufficient to bring home the charge under these two sections of the P.C. Act. (Ref:- **State of Punjab -Vrs.- Madan Mohan Lal Verma reported in A.I.R. 2013 S.C. 3368, State of Maharashtra -Vrs.- Dnyaneshwar reported in (2009) 44 Orissa Criminal Reports 425, Punjabrao -Vrs.- State of Maharashtra reported in A.I.R. 2002 S.C. 486, V. Sejappa -Vrs.- State reported in A.I.R. 2016 S.C. 2045, Panalal Damodar Rathi -Vrs.- State of Maharashtra reported in A.I.R. 1979 S.C. 1191, Mukhtar Singh -Vrs.- State of Punjab reported in (2016) 64 Orissa Criminal Reports (S.C.) 1016**).

14. In view of the foregoing discussions, I am of the humble view that the finding and reasons recorded on the charges and the observation made by the learned trial Court that the prosecution has succeeded to bring home the charges against the respondent under section 7 and section 13(2) read

with section 13(1)(d) of the P.C. Act is clearly erroneous. There is no acceptable evidence regarding demand and acceptance of bribe money by the respondent from P.W.5 and mere recovery of tainted money from the table of the respondent is not sufficient to prove such charges. Even though for the reasons assigned by the learned trial Court in acquitting the respondent are not acceptable, but the impugned judgment and order of acquittal is otherwise sustainable.

Accordingly, the GCRLA being devoid of merits, stands dismissed.

It appears that the respondent has been released on bail by the learned trial Court as per the order dated 19.01.2017 of this Court. The respondent is discharged from the liability of the bail bond. The personal bond and surety bonds stand cancelled.

The trial Court records with a copy of this judgment be sent down to the concerned Court forthwith for information.

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 12th October 2022/RKMishra