IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPEAL NO. 323 OF 2004

Mahesh S/o Rambhau Dhande,
Aged about 45 years, Occ. Service,
R/o Datta Colony, Gorakshan Road,
Akola, Tq and Dist. Akola ... Appellant

// VERSUS //

State of Maharashtra through Police Inspector, Anti Corruption Bureau, Akola ... Respondent

Ms. Sejal Lakhani, Advocate h/f Shri S.P.Bhandarkar, Advocate for appellant
Shri S.D. Sirpurkar, APP for the State / Respondent.

CORAM : ANIL S. KILOR, J.
DATED : 20th SEPTEMBER, 2022.

ORAL JUDGMENT :

In this appeal the challenge is raised to the judgment and order dated 5th May, 2004 passed by the Special Court, Akola in Special Case No.3/1999, convicting the appellant/accused for the offence punishable under Sections 7, 13(1)(d) read with Section 13(2) of Prevention of Corruption Act, 1988 (in short referred as "Act of 1988").

2. The brief facts of prosecution case is that, the accused was working as Sectional Engineer with Panchayat Samiti, Patur. The Shirla

Circle in which village Belora (Khd) was falling under the jurisdiction of the accused.

3. As per the District Rural Development Agency's scheme, "Dashlaksha Vihir Yojna", 100% grants was made available to small and marginal farmers for construction of well. This scheme was implemented through Panchayat Samiti, Patur.

4. Tulshiram Patkhede father of complainant Sheshrao Patkhede, was holding 2.3/4 acres of agricultural land at village Belor (Khd). The grant of Rs.45,000/- was sanctioned in his favour for construction of well. As per the scheme, the construction was carried out. Thereupon, grant of Rs.40,159/- was released from time to time in seven installments. However, last installments of grants of Rs.5000/- was to be received by Tulshiram Pathede.

5. On 5th August, 1998, PW-1 went to Panchayat Samiti, Patur. He met accused and demanded Rs.5000/- towards last installments of grants. At that time accused demanded bribe of Rs.2,000/- from him. On request by PW-1 the accused agreed to accept Rs.1000/- and asked PW-1 to bring that amount by evening. As PW-1 was not willing to pay the bribe, he lodged a complaint with ACB, Akola and after completing the pre-trap procedure a trap was conducted and after acceptance of amount by the accused from PW-1, he was caught hold by the trap party.

6. Thereafter, the offence was registered for the offence punishable under Sections 7 and 13(1)(d) read with Section 13(2) of Act

of 1988. After completion of investigation, the papers were forwarded to the sanctioning authority and on grant of sanction to prosecute the accused, the chargesheet was filed. The charge was framed and it was read over and explained to the accused who pleaded not guilty and accordingly the trial was conducted.

7. The learned trial Court after scrutinizing the oral as well as documentary evidence, passed the impugned judgment and order dated 5^{th} May, 2004, thereby convicting the appellant for the offence punishable under Sections 7 and 13(1)(d) read with Section 13(2) of Prevention of Corruption Act, 1988 and directed to suffer rigorous imprisonment for six months and to pay a fine of Rs.500/- and in default to undergo further rigorous imprisonment for two months, for the offence punishable under Section 7 of Prevention of Corruption Act. He is further sentenced to suffer rigorous imprisonment for a period of one year and to pay fine of Rs.500/- and in default to undergo further rigorous imprisonment for two months, for the offence under Sections 13(1)(d) of the Act of 1988.

8. I have heard Ms. Sejal Lakhani, learned counsel for the appellant and Shri Sirpurkar, learned Additional Public Prosecutor for the respondent/State.

9. Ms. Lakhani, learned counsel for the appellant submits that demand is *sine qua non* to constitute an offence under the provisions of the Act of 1988. It is submitted that in this case the prosecution has failed

to prove and establish the demand and acceptance of illegal gratification by the appellant/accused, hence, no offence attracts much less under Section 7, 13(1)(d) of Act of 1988.

10. She submits that the learned trial Court has committed error in not appreciating the oral as well as documentary evidence in right perspective and further convicting the appellant though demand was not proved. In support of her contention, she has placed reliance of the judgments of *State of Punjab v/s Madan Mohan Lal Verma*[1], *B. Jairaj ..vs.. State of Andhra Pradesh*[2] and *Mukhtiar Singh V/s State of Punjab*[3].

11. On the other hand, learned Additional Public Prosecutor supports the reasoning recorded by the learned trial Court, while convicting the appellant. He submits that learned trial Court after examining oral as well as documentary evidence, recorded detailed reasoning for conviction and as the learned trial Court has not committed any illegality or infirmity, this Court may maintain the conviction. Accordingly, he prays for dismissal of the present appeal.

12. In the light of submissions of both the parties, I have perused the record and proceedings and the impugned judgment and order of the trial Court.

1 2013 (14) SCC 153
2 (2014) 13 SCC 55
3 (2017) 8 SCC 136

13. It is a well settled law that the demand is *sine qua non* to attract the offence under the provisions of the Act of 1988 and mere recovery of tainted money is not sufficient to convict the accused, whereas, corroborative and cogent evidence is required. It is also settled law that unless foundational facts are established by the prosecution, burden under Section 20 of Act of 1988 about presumption does not shift upon the accused.

14. In the said backdrop, it is necessary to examine firstly whether the prosecution has succeeded in establishing and proving demand of illegal gratification by the accused and thereby whether the prosecution has brought on record the foundational facts.

15. The Hon'ble Supreme Court of India while dealing with the law on 'demand of illegal gratification', in the case of *State of Punjab v/s Madan Mohan Lal Verma (supra)* has held thus:

> *"11. The law on the issue is well settled that 'demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While*

> *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 probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convicting the accused person."*

16. In the case of *B. Jairaj ..vs.. State of Andhra Pradesh* (supra) while considering the issue whether mere possession and recovery of the currency notes from the accused is sufficient to hold that there was a demand of bribe, the Hon'ble Supreme Court of India held thus:

> "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 Sections 13 (1) (d) (I) and (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.*
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> *9. Insofar as the presumption permissible to be drawn under Section 20 of the Act is concerned, such presumption can only be in respect of the offence under Section 7 and not the offences under Sections 13 (1) (d) (I) and (ii) of the Act. In any event, it is only on proof of acceptance of illegal gratification that presumption can be drawn under Section 20 of the Act*

> *that such gratification was received for doing or forbearing to do any official act. Proof of acceptance of illegal gratification can follow only if there is proof of demand. As the same is lacking in the present case the primary facts on the basis of which the legal presumption under Section 20 can be drawn are wholly absent."*

17. As held in the case of *Mukhtiar Singh V/s State of Punjab* (supra), by the Hon'ble Supreme Court of India that, the prosecution in order to prove the charge under the provisions of Sections 7 and 13 of the Act, has to establish by proper proof, the demand and acceptance of illegal gratification and till it is accomplished, the accused should be considered to be an innocent and mere possession and recovery of the currency notes from the accused without proof of demand would not establish an offence under Section 7 as well as Section 13 (1)(d) read with Section 13(2) of the Act of 1988.

18. Thus from the above referred judgments, it is clear that demand of illegal gratification is *sine quo non* for constituting an offence under the Act of 1988. It is further clear that mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable. Proof of acceptance of illegal gratification can follow, only if, there is proof of demand.

19. In the light of above referred well settled principles of law, I examine the evidence relating to demand and acceptance of illegal gratification. For this purpose, the oral testimony of PW-1 complainant and PW-2, Panch No.1 (shadow witness) is relevant. Other witnesses examined by prosecution are PW-3 who is the Sanctioning Authority,

PW-4, mason at Panchayat Samiti, Patur, PW-5, Assistant Accountant Officer, Panchayat Samiti, Patur, PW-6, the station diary incharge and PW-7 who is the Investigating Officer.

20. PW-1, complainant in his oral testimony has deposed that he and his father reside jointly at village Belora and owned agricultural land which is in the name of his father. He states that in 1993, the loan was granted to PW-1 for construction of well. He further states that he and his father received Rs.40,000/- from the sanctioned amount of loan from Building and Construction Department, Panchayat Samiti, Patur. He further deposed that in 1993 itself he went to meet accused for taking balance amount of Rs.5000/-. PW-1 states that accused demanded money of Rs. 2000/- at that time. The purpose of demanding this amount was not disclosed by accused to him. PW-1 told accused that this was a big amount and he did not have this much money. Accused then agreed to accept Rs.1000/-. As PW-1 was not ready to pay bribe amount, therefore, he lodged a complaint with the ACB, Akola.

21. From the above oral testimony of PW-1, it is evident that as per the complainant it was first demand. It is further evident that PW-1 was not knowing the purpose for which the said amount was demanded by the accused.

22. Moving further as regards the trap, PW-1 states that he and panch no.1 went to the office of accused. Accused was not present in his office. At about 6 pm the accused came. PW-1 saluted him and he also

saluted PW-1. Then PW-1 asked accused as to whether his cheque is ready, the accused answered in affirmative. The accused asked to PW-1 whether he has brought the money. PW-1 said yes. Accused then told PW-1 that he should go to Janata Hotel, he would follow him. PW-1 and PW-2 went to Janata Hotel and sat on the bench. Accused and one person who was accompanying him came there. Accused then placed order for four cup of tea, after taking tea, the accused demanded money and prior to that person accompanying him went away. Accused told him to give the amount. PW-1 took out the currency notes from right pocket of his pant and gave it him. Accused accepted that amount by his right hand and put it in the left chest pocket of his Manila. Thereafter PW-1 gave pre-trap signal. Thereupon, the trap party came there and caught hold the accused and thereafter the further process was followed.

23. PW-2 who is the panch no.1, the shadow witness in his oral testimony while deposing in respect of demand during the trap states that, he and PW-1 entered in the office of the accused. PW-1 asked the accused as to what has happened about his cheque. Accused asked PW-1 whether he had brought his amount. The accused further asked PW-1 whether he had brought two forms in respect of grant as well as revenue stamp. PW-1 was not having those forms and then accused told him to purchase those forms. Accused further told that PW-1 should not bother about revenue stamp. Then PW1 and PW-2 went to Purad Xerox Centre which is located adjoining to that office. Then purchased two forms and returned to the office of the accused. Accused asked the complainant to sign those forms. PW-1 signed to those forms as Tulshiram Udeybhan

Potekhede. Those two forms then gave to accused. PW-2 then says that PW-1 asked accused whether he should give Rs.1,000/- demanded by the accused to him. Upon that the accused told complainant that there is Janata Restaurant at near bus stand and asked to go ahead, he will follow. Both PW-1 and PW-2 went to Janata Restaurant and sat on the bench. Thereafter, accused and one person came there. They had tea. Then the person who accompanied with the accused went away. Accused demanded of Rs.1000 to PW-1 and told him that money should be given immediately as he wanted to go to Akola. PW-1 then took out the currency notes by his right hand and gave the same to accused. Accused accepted those currency notes by his right hand and kept them in left chest pocket of his Manila. PW-1 gave pre-trap signal, the members of the raiding party came there and caught hold the hands of the accused.

24. If the oral testimony of PW-1 and PW-2 is considered, then PW-1 has not deposed about the two forms which were signed by him in the name of his father and submitted with the accused.

25. Furthermore, PW-2 states in his oral testimony that the complainant PW-1 asked the accused whether he should give Rs.1000/- as demanded by accused to him. This shows that even before the accused made demand to PW-1, he offerred the amount to him.

26. From the evidence of PW-1 it is evident that at the time of the first demand nobody was present. Moreover, it is not the case of the prosecution that after the demand of Rs.2000/- was made by the accused

to complainant and as he could not understand the purpose of such demand, he made inquiry about the purpose for which such demand is made. In addition to this, forms which were signed by PW-1 in the name of his father and submitted to the accused were not seized and produced on record to corroborate the story of the prosecution. Thus, it can be seen that no cogent and cognate evidence has been produced by the prosecution to establish that there was a demand of bribe by the accused.

27. In this case, corroborative evidence to establish demand of bribe, is required in view of the fact that in the evidence of PW-4, he has deposed that he provided one mason from his community for doing the work of the complainant. He further states that said mason came to him in the month of July, 1998 complaining that, though he completed the work, his charges were not paid by PW-1. He further states that, he told the accused that as per his say he provided a mason but PW-1 not making payment. He further admits that the accused told him that, when PW-1 would come for taking cheque of Rs.5,000/-, he will talk about this. He further states that PW-1 told the accused that he had to pay Rs.1000/- for mason.

28. Thus, from the evidence of PW-4 it can be seen that the amount paid to the accused appears to be towards the balance payment of mason who carried the balance work of the well of PW-1.

29. The evidence of PW-4 is significant in the light of the deposition of PW-2, wherein he has stated that PW-1 made inquiry with

the accused whether he should pay Rs.1000/- as demanded by accused. This further shows that there was no demand made by the accused but PW-1 own his own asked the accused whether he shall pay the amount.

30. Thus, from the above referred oral testimony of the prosecution witnesses, on demand and acceptance it can be said that the prosecution has failed to bring on record sufficient and cogent evidence. Therefore only because the amount was recovered from the accused it cannot be said that the said amount was given by the complainant to the accused towards bribe or illegal gratification. As far as the presumption is concerned, though the prosecution has failed to bring on record foundational facts, however, the accused has succeeded in explaining the amount accepted by him was towards the outstanding labour charges of the mason who did the work of construction of well. In the circumstances, it is not safe to uphold the conviction recorded by the learned trial Court.

31. Thus, in the light of the above referred discussion and the fact that the prosecution has failed to establish the demand and acceptance of the bribe amount by the appellant, the conviction recorded by the learned trial Court is illegal and bad in law. In the circumstances, I have no hesitation to hold that the impugned judgment and order dated 5th May, 1999, passed by Special Judge, Akola in Special Case No. 3 of 1999 convicting the appellant is illegal and liable to be quashed and set aside. Accordingly, I pass the following order.

i. The criminal appeal is allowed;

ii. The judgment and order dated 5th May, 2005 passed by Special Judge, Akola in Special Case No. 3 of 1999, is hereby quashed and set aside;

iii. The appellant is acquitted of the offence punishable under Sections Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988;

iv. His Bail Bonds shall stand cancelled;

v. The Muddemal Property be dealt with as per order of the learned Special Judge.

[ANIL S. KILOR, J.]