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

CRIMINAL APPEAL NO.659 OF 2004

Mohd. Abdul Hakim S/o Mohd. Azim,
about 65 years,
R/o Ansari Ward, Bhandara. ... Appellant

// VERSUS //

State of Maharashtra through Anti Corruption Bureau, Wardha
... Respondent

Shri R.M.Patwardhan, Advocate for appellant
Shri A.R.Chutke, APP for the State / Respondent.

CORAM : ANIL S. KILOR, J.
DATED : 14th SEPTEMBER, 2022.

ORAL JUDGMENT :

This appeal takes exception to the judgment and order dated 17th September, 2004, passed by the learned Special Court, Wardha constituted under the Prevention of Corruption Act 1988, (the "Act of 1988") in Special Case No. 6 of 1998, convicting the appellant for the offence punishable under Sections 7, 13(1)(d) read with Section 13(2) of Act of 1988.

2. The brief facts of prosecution case is that the complainant (PW-2) being educated unemployed and in need of financial assistance, had applied to the Tehsildar, Wardha for grant of loan under "Sanjay Gandhi Swalamban Yojna" for starting tea stall and pan thela. His application was allowed by Naib Tehsildar vide order dated 16th August, 1997 and he was informed to remain present in the office of Naib Tehsildar alongwith requisite documents mentioned in the letter dated 16th August, 1997 (Exh.40). Accordingly, the complainant (PW-2) attended the office of Naib Tehsildar on 18th October, 1997 and submitted necessary documents. Thereupon, the accused demanded Rs.100/- and as the complainant (PW-2) was not willing to pay bribe, he approached to ACB Office and lodged the report (Exh.38) on 20th October, 1997.

3. Thereafter pre-trap preparations were completed and trap was conducted. During the trap the accused/appellant was caught hold along with tainted amount and accordingly offence was registered.

4. Thereafter, on completion of investigation, the papers were forwarded to the sanctioning authority (PW-6) for grant of sanction to prosecute the accused and on grant of sanction the chargesheet came to be filed.

5. The learned trial Court framed the charges and explained it to the appellant/accused, whereupon he pleaded not guilty and accordingly, the trial was conducted.

6. The prosecution has examined as many as six witnesses to bring home guilty against the appellant for the offence punishable under Sections 7, 13(1)(d) read with Section 13(2) of the Act, 1988.

7. The learned trial Court after marshelling and scrutinizing the oral as well as documentary evidence, passed the impugned judgment and order dated 17th September, 2004, convicting the appellant for the offence punishable under Sections 7, 13(1)(d) read with Section 13(2) of Act of 1988 and is sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs.1,000/-, in default to undergo further rigorous imprisonment for two months for the offence punishable under section 7 of the Act of 1988; rigorous imprisonment for the period of one year and to pay fine of Rs.1000/-, in default to undergo further rigorous imprisonment for two months for the offence punishable under section 13(1)(d) read with section 13(2) of the Act of 1988 and the same is under challenge in this appeal.

8. I have heard Shri Patwardhan, learned counsel for the appellant and Shri Chutke, learned Additional Public Prosecutor for the State.

9. Shri Patwardhan, learned counsel for the appellant submits that despite the prosecution failed to prove the demand, the learned trial Court erroneously held that demand is proved. It is submitted that the demand is *sine qua non* to constitute an offence under the provisions of the Act of 1988. He, therefore, submits that in absence of evidence to

establish demand, no offence under Sections 7, 13(1)(d) read with Section 13(2) of Act of 1988, would attract against the appellant.

10. He further submits that the sanction granted to prosecute the appellant suffers from non-application of mind and hence, it vitiates.

11. Shri Patwardhan, learned counsel for the appellant lastly argues that the letter dated 16th August, 1997 (Exh.40) shows that the loan was sanctioned much prior to the date of trap in favour of the complainant. He further argues that, as far as disbursement of the loan amount is concerned, it was not within the powers of the appellant. Accordingly, he prays for quashing and setting aside of the impugned judgment and order. In support of his contention, he has placed reliance of judgment of Hon'ble Supreme Court in the case 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].

12. On the other hand, Shri Chutke, learned Additional Public Prosecutor supports the findings recorded by the learned trial Court as regards demand and acceptance of bribe. He further supports the conviction recorded by the learned trial Court.

13. It is submitted that learned trial Court after examining the oral as well as documentary evidence and after recording the reasons for conviction, passed the impugned judgment and order, hence, no legal

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

infirmity or illegality committed by the learned trial Court in convicting the appellant.

14. Shri Chutke, learned Additional Public Prosecutor further submits that because of minor discrepancies in sanction order it cannot be said that the sanctioning authority has not applied his mind before granting sanction. Accordingly, learned Additional Public Prosecutor prays for dismissal of the present appeal.

15. In the backdrop of the submissions of the rival parties, I have perused the record and proceedings and the impugned judgment and order of the trial Court.

16. 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."*

17. 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."*

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. 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 that it is accomplished, the accused should be considered to be 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, evidence on record has to be scrutinized to find out whether foundational facts are established on demand.

20. In view of settled law that the demand is *sine qua non* to constitute an offence under the provisions of the Act of 1988. In order to examine therefore, whether the prosecution has proved the demand, I will refer to the evidence of PW-1 and PW-2, who are the panch no.1 and complainant respectively.

21. In the oral testimony of PW-2, he states that in the year 1997 he was unemployed and was in search of some occupation. He came to know about "Sanjay Gandhi Swalamban Yojna". He submitted an application for grant of loan to Tehsil Office. He waited for two months and on receiving a letter, on 18th October, 1997 he went to the office of accused who informed him that loan of Rs.1,000/- is sanctioned to him. PW-2 further states that his friend told him that if Rs.100/- is paid then loan amount can be received immediately. He further states that accused told him that he should pay Rs.100/- to him and then he will pay loan amount of Rs.1000/-.

22. The above oral testimony of PW-2 is in respect of first demand made by the accused. It is evident from the above oral testimony that the friend of PW-2 told him that if Rs.100/- is paid then loan amount can be received immediately. It is not clear from the evidence whether that friend was accompanying the complainant when PW-2 met the accused and if he was accompanying the complainant no explanation has been offered by the prosecution for not examining the said witness in support of first demand.

23. PW-2 nowhere states that it was in the official capacity and power of the accused to disburse the loan after the same was sanctioned and therefore he met him and against the said work, the amount was demanded.

24. The prosecution has not brought on record anything to show that it was within the powers of the accused to disburse the amount after the loan was sanctioned.

25. PW-2 further in his oral testimony while stating about the demand during the trap, deposed that he and PW-1 went to Tehsil Office and met the accused. He asked the accused as to whether his work is done, PW-2 told to the accused to come for tea. The accused came for tea. One person also accompanied the accused. A friend namely Vijay Kangale was with him.

26. PW-2 further states that they went to canteen of Pangul and ordered for breakfast. After having breakfast, they had tea. He further states that he gave two notes of 50 denomination of currency to accused and gave pre-determined signal and accordingly the trap party came there and caught hold the accused.

27. No explanation has been offered by the prosecution for not examining the friend of the complainant who was all the time with the complainant. Thus, it can be seen that the prosecution has failed to examine independent witnesses namely the friend of complainant.

28. In the above referred backdrop, now I will move to the evidence of PW-1 (panch witness no.1). PW-1 in his oral testimony deposed that he entered in the office of Naib Tehsildar with the complainant (PW-2). They met a lady clerk and enquired about the loan which was to be received by the PW-2. The lady clerk gave some forms of

bond. The complainant filled in those forms and signed them. Then PW-1 and friend of PW-2 also signed the forms. Those documents and a register were then placed before the accused. Accused then told it is now lunch time and he is going to take tea. Accused went out. Then, PW-1, PW-2 and his friend also followed the accused to the hotel and had tea. Accused ordered misal. They ate that misal. PW-2 then asked as to what happened about his case. The accused told that he will give money after going to the office. PW-1 further states that accused told the PW-2 that he should give Rs.100/- as told. PW-2 gave tainted currency note from his right pocket of full pant and accused accepted by his right hand. Thereafter, PW2 gave pre-determined signal and accused was caught hold by the trap party.

29. From the evidence of PW-1, it can be seen that in the canteen the accused told the complainant that he should give Rs.100/- as told. This part of demand of Rs.100/- is missing in the oral testimony of the complainant PW-2. Even if it is considered as a demand, this evidence falls short to say that the demand was towards bribe, because at the time of alleged first demand, made by the accused to the complainant, PW-1 was not present.

30. Moreover, the lady clerk to whom PW-1 and PW-2 were met first, was not examined. The forms and bonds which were signed by PW-2 complainant and PW-1 panch no.1 and friend of PW-2, are not seized and exhibited by the prosecution in corroboration of the case of the prosecution.

31. Thus, there are major discrepancies in the oral evidence of PW-1 and PW-2. The incidence of meeting the lady clerk during the trap and signing of forms by PW-1, PW-2 and friend of PW-2 is not stated by PW-2 complainant. These discrepancies are fatal. Thus, from the evidence led by the prosecution on the point of demand and acceptance on bribe by examining PW-1 and PW-2, it can be safely said that the prosecution has failed to establish the demand and acceptance of bribe by the accused.

32. As far as submission of the appellant that the loan was already sanctioned much before the trap was conducted and so far as the disbursement of loan amount is concerned, it was not within his powers and therefore the work for which the alleged demand was made was not within his powers. In this regard nothing has been brought on record by the prosecution to show that disbursement of amount was within the official powers of the accused. Furthermore, it is not the case of the prosecution that the accused induced a belief that he would render assistance to PW-2 and PW-2 gave the gratification under that belief.

33. Moving further it is settled law that unless foundational facts are established and proved, the presumption under Section 20 of the Act of 1988 does not come into picture and unless foundational facts are proved and established the burden does not shift on the complainant to explain the acceptance of amount. In this case as demand is not proved, the burden would not shift on the complainant to explain the acceptance of amount. However, in the statement under Section 313 of Code of

Criminal Procedure, the appellant has given explanation about the alleged bribe amount.

34. It is further settled law that mere recovery of amount is not sufficient to prove the demand and acceptance but further cogent and cognate evidence is required to establish the demand and acceptance. In this case, the prosecution has failed to prove that the amount recovered from the appellant was of a bribe amount.

35. In the circumstances, I hold that prosecution has failed to prove the demand and acceptance and thereby I further held that no offence under Sections 7, 13(1)(d) read with Section 13(2) of the Act of 1988 would attract in this case against the appellant.

36. As far as the sanction is concerned, after going through the evidence of sanctioning authority PW-6, he has categorically stated that he had gone through all the documents which he received and after satisfaction that the appellant is guilty of the alleged offence, sanction was given. The only discrepancy about the date of letter dated 16th August, 1997 is not sufficient to say that the sanctioning authority has not applied his mind. In the circumstances, I reject the contention of the learned counsel for the appellant that sanction order was without application of mind.

37. 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 no offence would attract in this case.

Accordingly, 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 17th September, 2004 passed by Special Judge, Wardha in Special Case No. 6 of 1998 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 17th September, 2004 passed by Special Judge, Wardha in Special Case No. 6 of 1998 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.]

SACHINDANAND K NAIR

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