**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPEAL NO. 273 OF 2009

Ashok S/o. Dashrathji Khot,
Aged about 60 years, Occ.: Retired,
R/o. Ram Nagar, Nagpur.

.... **APPELLANT.**

// **VERSUS** //

State of Maharashtra,
Through Police Station Officer,
Sadar, Nagpur.

.... **RESPONDENT.**

Shri J.M.Gandhi, Advocate for Appellant.
Shri S.A.Ashirgade, A.P.P. for Respondent/State.

**CORAM : ANIL S. KILOR, J.
DATED : AUGUST 11, 2022.**

ORAL JUDGMENT :

1. This appeal takes exception to the judgment and order dated 25/03/2009 passed by the Special Court, Nagpur constituted under the Prevention of Corruption Act, 1988 (hereinafter referred to as the "Act of 1988"), in Special Criminal Case No.11 of 2003, thereby convicting the

Appellant/Accused for the offences punishable under Sections 7, 13(1)(d) read with Section 13(2) of the Act of 1988 and sentencing him to suffer rigorous imprisonment for two years and to pay a fine of Rupees Fifteen Thousand, in default to suffer rigorous imprisonment for thirty days for the offence punishable under Section 7 of the Act of 1988 and further sentenced him to suffer rigorous imprisonment for two years and to pay a fine of Rupees Fifteen Thousand, in default to undergo further rigorous imprisonment for thirty days for the offence punishable under Sections 13(1)(d) and 13(2) of the Act of 1988.

2. The prosecution story, in brief, is that the accused was working as Sub-Divisional Officer during the period from February 2002 to April 2002 in Zilla Parishad, Rural Water Supply Sub-Division, Nagpur. During the said period he was also holding the additional charge of Executive Engineer, Rural Water Supply, Zilla Parishad, Nagpur.

3. In view of the sanction for laying pipeline of 150 meters and to erect stand-post and to repair valves in the village Bhui (Zamkuli), Tahsil : Bhiwapur, District : Nagpur, the complainant-Sachin Deshmukh (P.W. No.2), as a contractor, did the said work worth Rs.43,404/- and

final bill was prepared after measurement of the work was done. Accordingly, the bill was sent to the office of the Executive Engineer, Rural Water Supply, Zilla Parishad, Nagpur for sanction.

4. On 30/03/2002 P.W.2-Complainant met the accused in his office, in connection of his bill and made a request for sanction of the bill at the earliest. The accused thereupon, made a demand of bribe of Rs.2,000/- from the P.W.2. As the P.W.2 had no amount with him the accused asked him to bring the amount within 2 to 4 days. Consequently, the complainant who had no desire to give the bribe to the accused, lodged a complaint with the office of Anti-Corruption Bureau.

5. Thereafter, the necessary process was completed and a trap was conducted on 02/04/2002 and on the date of the trap when the complainant PW-2 made a request to pass his bill at the earliest, the accused made a demand of bribe of Rs.2,000/-. Thereupon, the complainant gave Rs.2,000/- to the accused, who accepted it and kept in his shirt pocket.

6. The Trap Party members whereupon caught hold both the hands of the accused and then procedure was followed for testing of the

fingers of the complainant and the accused, of offering and acceptance of the bribe.

7. Thereupon, investigation was completed and the papers were sent for sanction and on receiving the sanction to prosecute the accused/ appellant, charge-sheet came to be filed.

8. Thereafter charge was framed and it was read-over to the accused. The accused pleaded not guilty and claimed to be tried.

9. In order to bring home the guilt of the accused, the prosecution has examined as many as six witnesses viz. P.W. 1-Deepak Bhansale at Exh.21 (Sanctioning Authority), P.W. 2-Sachin Deshmukh at Exh.25(complainant), P.W. 3 Head Constable Govind Kakde at Exh.32 (Carrier of complaint of Investigating Officer to P.S. Sadar and Mudemal in the office of Chemical Analyst), P.W. 4-Shri M.M.Tol at Exh.37 (an official in the office of Executive Engineer, Rural Water Supply Division, Z.P. Nagpur), P.W. 5 Dilip Sonewar at Exh.40 (Panch No.1) and P.W. 6 Shri S.J. Patil at Exh.55 (Investigating Officer).

10. The learned trial Court, after marshalling the oral as well as

documentary evidence, passed the impugned judgment and order dated 25/03/2009 and thereby convicted the appellant/ accused for the offence punishable under Section 7, 13(1)(d) and 13(2) of the Act of 1988, the same is under challenge in this appeal.

11. I have heard learned counsel for the appellant and learned A.P.P. for the respondent/State.

12. Shri Gandhi, learned counsel for the appellant has made following submissions:

a) The sanction granted by PW 1 (Sanctioning Authority) is not valid.

b) The complainant (PW 2) does not support the case of the prosecution about the demand and acceptance.

c) The prosecution failed to establish and prove the demand and acceptance of bribe by the appellant.

d) There is delay in submitting the Muddemal and no evidence has been produced to show that during the intervening period the Muddemal was safe from tampering.

f) There is delay of seven hours in lodging the F.I.R.

13. The learned A.P.P. on the other hand, strongly opposed the present appeal and made following submissions :

i) The learned trial Court after scrutinizing the evidence, oral as well as documentary and after recording the findings in detail, has held that the appellant is guilty.

ii) The prosecution has examined as many as six witnesses and thereby the prosecution has brought sufficient evidence on record to prove and establish the demand and acceptance of the bribe.

iii) There is no defect in sanction granted by the Sanctioning Authority.

iv) The delay in lodging the F.I.R. is not valid in this case.

v) Since Panch No.1 was examined and the demand and acceptance has been proved and as the amount was recovered from the accused, non-examination of Panch No.2 is not fatal.

vi) He lastly argues that as the impugned judgment and order is sustainable in the eyes of law, this Court may not interfere with the conviction granted by the learned trial Court.

14. In the backdrop of the submissions put-forth by both the parties, I have, with the able assistance of the learned counsel for the appellant and the learned A.P.P., perused the record, proceedings and the impugned judgment and order.

15. As the issue of validity of sanction goes to the jurisdiction of the Court to entertain the trial, I think it proper to deal with it first.:

16. For the purpose of validity of sanction, oral testimony of Sanctioning Authority Deepak Keshav Bhansale (P.W.1), who was the Member Secretary in Maharashtra Jeevan Pradhikaran, is relevant. P.W. 1 in his examination-in-chief states that he found that there was sufficient material to accord sanction to prosecute Ashok Khot and accordingly, he accorded sanction. However, in cross-examination, he states that he does not remember whether sanction was sought against Sub-Divisional Officer or acting Executive Engineer. He states that the sanction was accorded against acting Executive Engineer. He further admits that appointing authorities of Executive Engineer and of Deputy Executive Engineer are different. He further states that it is a fact that accused's appointment was done by the State of Maharashtra and he was not appointed by Maharashtra Jeevan Pradhikaran. He categorically stated that parent department of the accused was Irrigation Department. Initial appointment of the accused was made by Superintending Engineer, Irrigation Department. He admits that Chief Engineer is competent to appoint and remove Executive Engineer and Deputy Executive Engineer. Thus, without a proper sanction the present case must fail because this being the manifest defect in the prosecution, the entire process therefore, is rendered *void ab initio*.

17. Thus, from the evidence of P.W. 1 it reflects that P.W.1 was neither the appointing authority nor was removing authority. In the circumstances, I have no hesitation to hold that P.W.1 is not the Sanctioning Authority, in the present case as stipulated under Section 19 of the Act of 1988, and accordingly the sanction is invalid.

18. At this juncture, looking to the controversy involved in this case, I am of the opinion that it would be relevant to refer the Sections 7 and 13 of the Act of 1988, which read thus:

> ***7. Public servant taking gratification other than legal remuneration in respect of an official act*** *– Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, 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 functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of Section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.*

> *13. **Criminal misconduct by a public servant** – (1) A public servant is said to commit the offence of criminal misconduct, -*
> *(a)…*
> *(b)…*
> *(c)…*
> *(d) if he,-*
> *(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or*
> *(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage or*
> *(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or*
> *(e)…..*
> *(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine."*

19. The Hon'ble Supreme Court of India while dealing with the law on 'demand of illegal gratification', in the case of *State of Panjab v/s Madan Mohan Lal Verma*[1], 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*

1 2013 (14) SCC 153

> *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."*

20. In the case of *B. Jayaraj V/s State of Andhra Pradesh*[2] 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*

2 (2014) 13 SCC 55.

> *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.*
>
> *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."*

21. The Hon'ble Supreme Court of India has followed the said view in the case of *C. Sukumaran V/s State of Kerala*[3], *N. Vijaykumar V/s State of Tamil Nadu*[4], and *K. Shanthamma V/s the State of Telangana*[5].

3 (2015) 11 SCC 314.
4 (2021) 3 SCC 687.
5 Cri. Appeal 261/2022 dt. 21.02.2022.

22. 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.

23. As held in the case of *Mukhtiar Singh Vs. State of Punjab*[6] , 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.

24. In the teeth of above referred well settled principles of law, I will examine whether the prosecution has established and proved the

6 (2017) 8 SCC 136.

demand and acceptance of bribe by the accused. For this purpose, the evidence of P.W.2 and the evidence of P.W.5 panch No.1 is relevant.

25. P.W.2-Sachin Deshmukh-complainant, though in his examination in chief has stated that at the time of trap, a request was made by him to accused to pass the bill regarding laying of pipeline of 150 meters, accused said that bill cannot be passed in such a fashion. The accused insisted him that he will have to give Rs.2,000/- to clear and pass that bill. He further states that the accused then inquired from him whether the amount has brought, to which he answered in the affirmative. He, thereafter, took out those tainted currency notes from left side shirt-pocket and gave it to the accused. The accused then took those currency notes by his left hand and kept in his left side shirt pocket.

26. Whereas, in the cross-examination P.W. 2 stated that the accused reached his office at about 6:00 to 6:30 p.m. on the date of the trap. Thereupon, the P.W.2 and Panch No.1 reached in the chamber of the accused, then P.W. 2 told the accused that despite him visiting many times his bill was not passed. The accused thereupon replied that he had just now returned from Saoner and he is busy in another matter and

asked P.W. 2 to come tomorrow. P.W. 2 whereupon requested the accused that he is a poor person and further requested to clear his bills at the earlist. The accused asked him to come to the office next morning. Thereafter P.W. 2 and panch No.1 were returning back and reached near the door of chamber of the accused and thereafter P.W. 2 reached near the table of the accused. Thereon again P.W. 2 made a request to the accused to clear his bills at the earliest and attempted to put the tainted currency notes in his shirt pocket and literally inserted it.

27. This evidence of P.W. 2, complainant does not support the case of the prosecution about demand and acceptance of bribe amount. In the cross-examination, the complainant P.W. 2 has admitted that he put the tainted currency notes in the shirt pocket of the accused and literally inserted it in his pocket. He does not speak about any demand by the accused or acceptance of bribe amount voluntarily.

28. In the said backdrop, I will examine the oral testimony of P.W. 5-Dilip Parasram Sonewar who is panch No.1 and who was with the complainant at the time of trap.

29. P.W. 5 in his examination-in-chief has deposed that on the date of trap the complainant told the accused that his bill has yet not been cleared and for that purpose he has come to his office.

30. P.W.5 states that, at the time of trap, it was stated by the accused that he is busy in another matter and asked P.W. 2 and him to come on next day. The complainant then told the accused that he has brought money for the said work and he kept that amount on the table. Thereafter the said amount was lifted from table by the accused and he kept in his pocket and thereupon, P.W. No. 2 and he both came out of the cabin of the accused and gave signal to the trap party members.

31. Thus, there is a contradiction in the oral testimony of the complainant and the P.W. 5-panch No.1.

32. P.W. 2 in his cross-examination has stated that he put tainted currency notes in the shirt pocket of the accused and literally inserted it. Whereas, panch No.1 (P.W.5) states that the complainant P.W. 2 kept the amount on the table which was later on lifted by the accused from the table and kept in his shirt pocket. This contradiction in oral testimony of P.W. 2 and P.W.5, is fatal.

33. In the deposition of P.W. 5 there is no mention about the demand of bribe made by the accused. On the other hand, he states that the complainant on his own informed the accused that he had brought money for the said work and kept that amount on the table.

34. Thus, it is clear that neither P.W.2 nor P.W. 5 has stated anything about the demand by the accused. As such in this case, the prosecution has failed to establish demand and acceptance of bribe and in that view of the matter, no offence under Section 7, 13(1)(d) and 13(2) of the Act of 1988 is established against the accused/appellant.

35. In the case of *The State of Maharashtra ..vs.. Prabhu Barku Gade*[7], this Court at Bombay has held thus :

> "*26. So far as the evidence of recovery of tikav, blood-stained clothes from the person of the appellant and blood-stained frock from Pramila are concerned, the aforesaid recoveries would not be of much avail to the prosecution for there is no evidence on record to show that from the time the aforesaid articles were recovered and till the time, they were sent to the Chemical Analyst, the gap being of more than 8 days, they were kept throughout in a sealed condition. It was obligatory on the part of the prosecution to lead link evidence to that effect. This was imperative because the possibility that the prosecution may have put human blood on the aforesaid articles during that interregnum, had to be eliminated before any reliance on the aforesaid recovery evidence could be placed. The question is not whether*

7 1994 SCC OnLine Bom 542

human blood was actually put on the recovered articles but as to whether it could have been put, observed a Division Bench of the Rajasthan High Court in the case reported in AIR 1955 Rajasthan page 82 (State v. Motia). The aforesaid decision was followed by a Division Bench of our own Court in the decision reported in 1994 (4) Bombay Cases Reporter page 85 (Deoraj Deju Suvarna appellant v. State of Maharashtra, respondent) Criminal Appeal Nos. 603, 608 and 624 of 1993 connected with Confirmation Case No. 3 of 1993 to which one of us (Sahai, J.) was a party."

36. Moving further, in this case, the trap was conducted on 3rd April 2002, whereas it has come in the evidence of P.W.3-HC Anti Corruption Bureau, Nagpur Govind A. Kakde, that, on 10/04/2002 he carried Muddemal property to the office of Chemical Analyzer, Nagpur.

37. Thus, there is delay of about 7 days in taking Muddemal property to the office of the Chemical Analyzer, Nagpur.

38. In the cross-examination of P.W. 3 he states that he was not knowing where the muddemal was kept, when it was brought from Zilla Parishad office or a separate panchnama for keeping the muddemal was prepared. He states that no separate panchnama about condition of bottle whether it was seized or otherwise, on the date when it were carried to ACB Office or to Chemical Analyzer by him, was prepared.

39. Thus, nothing has been brought on record by the prosecution to show that from the time articles were recovered and till the time they were sent to the Chemical Analyst, as gap being of about seven days, they were kept throughout in the sealed condition. No linked evidence has been led by the prosecution to that effect. Thus, it creates doubt about correctness of the samples collected by the prosecution and sent to the Chemical Analyst.

40. Moreover, in Panchnama-2 it is stated that both the panchas, complainant and all the members of the Raiding Party turn by turn dipped the fingers of their respective hands into the solution, but the colour of the solution did not change. Hence, it is evident from Panchnama-2 that even after the complainant dipped the fingers of his hand in the solution the colour of the solution did not change. Whereas, it is the case of the prosecution that the complainant had given the currency notes by his left hand to the accused. Thus, it further creates doubt about the veracity of the prosecution story about giving tainted currency notes by the complainant to the accused.

41. In the above referred backdrop and as the prosecution has failed to establish the demand and acceptance of the bribe amount by the

accused, I am of the opinion that the learned trial Court has committed error in convicting the appellant for the offence punishable under Sections 7, 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988. Accordingly, I pass the following order:

i) The appeal is allowed.

ii) The judgment and order dated 25/03/2009 passed by the Special Court, Nagpur Constituted under the Prevention of Corruption Act, 1988 in Special Criminal Case No. 11 of 2003 is hereby quashed and set aside.

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

iv) His Bail Bonds shall stand discharged.

v) The fine amount shall be refunded back to the appellant.

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

The criminal appeal stands **disposed of** accordingly. The pending applications, if any, shall stand disposed of accordingly.

JUDGE

RRaut..