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

CRIMINAL APPEAL NO.446/2009

Prakash s/o Bhaskarrao Patil,
Aged about 42 years, Occu: Junior Clerk,
Nagpur Municipal Corporation,
Health Department,
R/o. Plot No.35, Sanket Nagar,
Ring Road, Nagpur.

.....APPELLANT

// VERSUS //

The State of Maharashtra,
Through Deputy Superintendent of Police,
Anti Corruption Bureau, Nagpur.

.... RESPONDENT

Mr. Prakash Naidu, Advocate for appellant.
Mr. A. R. Chutke, APP for respondent/State.

CORAM : AVINASH G. GHAROTE, J.

**DATED : 14/06/2022, 15/06/2022 &
16/06/2022**

ORAL JUDGMENT :

1] This is an appeal under Section 374 of the Code of Criminal Procedure (hereinafter referred as 'the Cr.PC.') challenging the judgment passed by the learned Sessions Court dated 5.9.2009 convicting the appellant for the offence under Sections 7 and 13 (i) (d) and 13 (2) of the Prevention of Corruption Act (hereinafter referred as "the P.C.Act"), whereby the appellant has been sentenced to suffer R.I. for one year and a fine of Rs.10,000/- in default, S.I. for three months for the offence

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punishable under Section 7 of the P.C. Act and sentenced to suffer R.I. for one year and pay a fine of Rs.10,000/-, in default to suffer S.I. for three months for the offence punishable under Section 13(1)(d) and 13(2) of the P.C. Act.

2] The incident is dated 18.1.2001. It is alleged that the complainant Sudhakar Ghule (PW-1 page 24) had purchased a plot in 1996 from one Suresh Rothe in Shaktimata Nagar, Nagpur, upon which he had constructed a house in the year 1998 and was residing there. The demand for tax was received in the name of the old owner. On 29.1.1997, the complainant had deposited the necessary fees for mutation of his name and in pursuance thereto had visited the office of Nagpur Municipal Corporation, a number of times. On 15.1.2001, the Corporation Surveyor had visited the house of the complainant for reassessment of taxes. The appellant/accused was a Tax Assessment Inspector in the Corporation and was one of the persons who had visited the house of the complainant on 16.1.2001, on which date the documents in respect of property, being demanded, were shown to him, whereupon a form was given by him to be filled up by the complainant and returned back to him. The said form was in the name of the previous owner and it was informed by the accused to the complainant that the form could not be changed and mutation could not be effected unless

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something is paid to him. The accused further informed the complainant that he would visit him the next day to collect the form (Exh.11). On 17.1.2001, when the accused came, the form (Exh.11) was handed over by the complainant to him, whereupon the accused is claimed to have made a demand of Rs.2,000/- for the mutation. This was not agreeable to the complainant, whereupon the accused is claimed to have told him that he would do the work for Rs.1500/-.

3] The complainant being unagreeable to the same, went to the office of the Anti Corruption Bureau (hereinafter referred as 'ACB') on 17.1.2001 and lodged a complaint (Exh.12 pg.31). The complainant was called to the office of the ACB on the next day i.e. 18.1.2001, wherein two persons, one of them being PW-2 Panch Dnyaneshwar Lohi (Exh.17, pg.52) another panch and other officers were present and the complaint made by the complainant being shown to them, these persons including PW-2 had enquired about the complaint with the complainant to the veracity of which he asserted. It is claimed by the complainant that on 18.1.2001 he was given a demonstration of the chemical reaction of phenolphthalein powder and sodium carbonate solution in the office of the ACB. The complainant had taken Rs.1,500/- with him in the denomination of Rs.500x2 and Rs.100x5 and the phenolphthalein powder was applied to these currency notes, which were kept in his shirt

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pocket with the instructions not to touch till demanded. The complainant was informed that one person would be with him when the accused would visit him. The complainant was also asked to remove his handkerchief from his left hand pocket, wipe off his face and keep it on his shoulder as a signal of money having passed on, whereupon the raid would be conducted.

4] Accordingly, the raiding party along with two panchas went to the house of the complainant and upon enquiry, the wife of the complainant informed that the accused had already come to his place and had told that he would come back within 15 minutes, whereupon the complainant with PW-2 Dnyaneshwar Lohi, the Panch sat in the outer room and the raiding party sat in the inside room. Fifteen minutes thereafter, the accused came to the house of the complainant and is claimed to have asked the complainant about the money in presence of PW-2, whereupon the complainant enquired with him about his work, upon which the accused told him to have faith in him and his work would be done within 8-10 days. The accused also told him that the complainant should come in his office at 3.00 p.m. and he would introduce him to the officers to whom the accused had to give some money. Thereupon, the complainant took out the tainted currency notes from his pocket and gave them to the accused, who took them with his

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right hand and kept them in his left side shirt pocket. The complainant thereafter offered tea to the accused and went to the inside room and gave the signal, whereupon the raiding party immediately came in the outer room. Upon the complainant showing them the accused, who was sitting on the chair, members of the raiding party caught hold of the accused, who tried to escape saying that he did not accept the money, whereupon the officers told him to keep quite and the complainant was asked to go out side the room. After sometime, the complainant was called inside the room by the officers and his right hand was dipped into a chemical solution, whereupon it turned violet. The said solution was collected in one bottle and seized. The portion of the shirt which had come in contact with the tainted currency note was also dipped in the solution, whereupon it also turned violet and the statement of the complainant was thereafter recorded.

5] After completing the necessary formalities, the charge-sheet came to be filed before the learned Sessions Court. The charge was framed on 7.8.2008 (pg.21 Exh.6). The prosecution examined four witnesses, PW-1 the complainant Sudhakar Ghule, PW-2 Panch witness - Dnyaneshwar Lohi, PW-3 Investigating Officer Bharatbhushan Sharma (pg.71 Exh.22) and PW-4 Sunil Anandrao Jadhav (pg.92 Exh.28) the P.A. to the Municipal Commissioner, who was the sanctioning authority. No

defence witnesses were examined. The statement of the accused under Section 313 of Cr.PC was recorded on 19.8.2009 (Exh.31 pg 97).

6] The learned Sessions Court by the impugned judgment dated 5.9.2009 has convicted the appellant as indicated above.

7] Mr. Naidu, learned counsel for the appellant submits that for the purpose of convicting a person under Sections 7, 13 (1)(d) and 13(2) of the P.C. Act, proving of the demand is a *sine qua non*, without which the conviction cannot be sustained. He submits that in absence of the demand being proved, even if, money is recovered from the person of the accused, that by itself would not be considered a circumstance to bring home the guilt to the accused based upon the presumption under Section 20 of the P.C. Act. He places reliance upon (1) *B. Jayaraj Vrs. State of A.P, Criminal Appeal No.696 of 2014 decided on 28.3.2014, [2014 (2) RCR (Criminal)]* (2) *P. Satyanarayana Murthy Vrs. The Dist. Inspector of Police and Anr in Criminal Appeal No.31 of 2009 decided on 14.9.2015 [2015 (4) RCR (Criminal) 351]*, (3) *Khaleel Ahmed Vrs. State of Karnataka, Criminal Appeal No.746 of 2008 decided on 8.9.2015 [2016 (1) R.C.R. (Criminal) 366]*, (4) *N. Sunkanna Vrs. State of Andhra Pradesh, Criminal Appeal No.1355 of 2015 decided on 14.10.2015 [2015 (4) R.C.R. (Criminal) 797]* and (5) *V. Sejappa Vrs.*

State By Police Inspector Lokayukta, Chitradurga, Criminal Appeal No.747 of 2008, decided on 12.4.2016 [2016 (2) R.C.R. (Criminal) 860]. It is his contention that before conducting the raid, the demand has to be verified in the presence of the panchas either physically or telephonically, both of which according to him are absent in the instant case. Inviting my attention to the evidence of PW-1 and PW-2, he submits that this procedure has not been followed at all, as the panch PW-2 came into picture only on 18.1.2001 when the raid was conducted and therefore, there is no verification panchnama on record to demonstrate that at any point of time prior thereto the panch was taken by the complainant to the accused and in the presence of the panch, the accused had made a demand. He therefore submits that the crucial aspect of the verification of demand is absent in the present matter. He further, by inviting my attention to the evidence of PW-2 panch (pg.52, para 3 of the cross-examination) submits, that the panch makes a statement that the officer had told him on 15.1.2001 that he had received a complainant of a demand of bribe against the public servant and since the trap was not feasible on 16.1.2001, he was called on 17.1.2001, on which date the trap is claimed to have been conducted. Inviting my attention to the complaint at page 33 (Exh.12), he points out that the complaint is dated 17.1.2001 and therefore, it is an impossibility that the officer could have called PW-2 on 15.1.2001 informing him that

the trap was to be laid. He further invites my attention to the panchnama no.1 (Exh.18 pg.55) and submits that it contains the date of 15.1.2001 in para 1 itself as the date of execution of panchnama, whereas on the next page second para the date mentioned is 18.1.2001 which according to him destroys the credibility of the panchnama. He further submits that there are certain rulings which demonstrates the mode and method and the verification procedure and seeks a days accommodation to place them on record, considering which, list the matter tomorrow i.e. on 15.6.2022.

8] On 15.6.2022, Mr. Naidu, learned counsel for the appellant tendered across the bar a communication issued by the Jt. C.P./Spl. I.G.P., Anti Corruption Bureau, MS, dated 28.06.2004, in which, by quoting observations from *P. Sirajuddin etc. Vrs. State of Madras etc., 1971 Cri. L.J. 523* and *State of Uttar Pradesh Vrs. Bhagwant Kishore Joshi, AIR 1964 SC 221* it was directed that whenever a complaint regarding demand of bribe is received, proper verification shall be done before laying a trap. Mr. Naidu, learned counsel for the appellant submits that since in the instant case proper verification was not done, the impugned judgment could not be sustained.

9] Mr. Chutke, learned APP for respondent/State while opposing the contentions advanced by Mr. Naidu, learned counsel for the appellant, submits that the demand of illegal gratification by the accused is succinctly demonstrated by the complainant/PW 1 in his evidence where he narrates the entire sequence of events and the demand made by the accused on 17.1.2001 and so also the subsequent complaint on the same day and the trap made on 18.1.2001 and the transfer of tainted money from the complainant PW 1 to the accused. Further inviting my attention to the evidence of PW 2 the panch witness Shri Dnyaneshwar Lohi (Exh.17 pg.52), he contends that though initially the said witness has been declared as a hostile witness, however, consequent thereto he has been cross-examined by the learned APP in which, he has categorically admitted that a demand of bribe to the complainant by the accused was made in his presence which was also accepted by the accused. He therefore submits, that the conjoint evidence of PW 1 and PW 2 would demonstrate the factum of a demand for illegal gratification having been made by the accused and therefore, ingredients, to invoke Section 20 of the P.C. Act, stood fulfilled. He further submits, that PW 2 has also proved the pre-trap panchnama – 1 and Exh.18 and the position subsequent thereto regarding the post-trap panchnama not being disputed the offence stood proved and the conviction has rightly been rendered by the learned Special Court. In order to support his

contentions, he places reliance upon *Bhaskar Khashaba Yewle Vrs. The State of Maharashtra, 2020 ALL MR (Cri.) 158* (para 10) and *Sakharam s/o Namdeo Jadhao Vrs. State of Maharashtra, 2021 ALL MR (Cri) 1646* (para 13, 16 and 18).

10] Mr. Chutke, learned APP for the respondent /State further submits that in view of Section 162 (1) proviso and the explanation 162(2) of Cr. P.C. read with Section 145 of the Evidence Act, the alleged contradiction which is claimed to have come in the evidence of PW 2 during the course of his cross-examination to the effect that though he had stated before police that accused demanded amount for work of complainant, he could not assign any reason why it is not so mentioned in his statement, did not stand proved and therefore, could not be considered as material omission nor any reliance could be placed upon it so as to deter from the evidence of the PW 2 as stated by him in para 2 of the cross-examination by the learned APP where he makes a statement that accused had made a demand from the complainant for the work. He therefore submits, that the demand has been proved and the conviction based upon such demand, in view of the presumption under Section 20 of the P.C. Act would be justified.

11] The law in this regard, is fairly well settled that for the purpose of convicting a person under the provision of Section 7 by invoking the presumption under Section 20 of the P.C. Act. The demand has to be unquestionably proved and in absence of proof of demand the presumption under Section 20 of the P.C. Act could not be attracted. It is also a settled position of law that mere recovery of currency notes from the accused in absence of the prosecution proving the demand for illegal gratification would be of no consequence as what is necessary is the proof of demand [see :*P. Satyanarayana Murthy* (supra), *B. Jayaraj* (supra), *Khaleel Ahmed* (supra), *N. Sunkanna* (supra) and *V. Sejappa* (supra) and so also *K. Shanthamma Vs. The State of Telangana [Criminal Appeal No.261 of 2022] decided on 21.2.2022* and *Onkar Tukaram Ramteke Vs. The State of Maharashtra, Criminal Appeal No.357/2012, decided on 17/03/2022*]. It is thus apparent that, to bring home the guilt of an accused under the provisions of P.C. Act what is necessary is proof of demand of bribe by a public servant and its acceptance. In case, there is failure to prove demand of illegal gratification, the same would be fatal as the demand is the basic requirement of the provision. It is in light of this position, that the evidence has to be any appreciated since this is an appeal and the powers of this Court are coterminous with that of the learned Sessions Court, insofar as the appreciation of material on record is concerned. It

is also equally true that the evidence of the complainant in such cases cannot be the sole testimony upon which the conviction can be based as the complainant would be an interested witness and therefore, there would be necessity to prove the demand by an independent witness. The evidence in the instant matter will have to be appreciated as to find out whether the finding rendered by the Court below of the demand having been proved is correct or not.

12] The sequence of events has been narrated above, and need not be repeated. The complainant Sudhukar Ghule, who has been examined as PW 1 at Exh.10 has spoken in consonance with the narration of events stated in paras 2 to 5 above. He also speaks about panchnama - 1 and panchnama - 2 and the demand made by the accused and the trap having been made and successfully executed. It is material to note, that PW 1 in his examination-in-chief speaks that on 18.1.2001 when the accused had come to his residence in the presence of PW 2, he had asked him about the money. What is material to note that even PW 1, does not say that a demand for doing the work was made by the accused on 18.1.2001. According to PW 1, the demand has been made on 17.1.2001, whereas a perusal of his evidence indicates that on 18.1.2001 a mere enquiry has been made about the money, which according to PW 1 was claimed to have been made in presence of the

PW 2. i.e. the panch no.1.

13] In the cross-examination, PW 1 admits that he did not know the exact nature of duty of accused and the accused had also given the PW 1 an offer that the form which was given to him on 17.1.2001 could be given at the NMC Counter at Mahal, Nagpur. What is material to note, is that though the complaint has proved Exh.12 the complaint filed by him with the ACB office on 17.1.2001 (pg.31) however, a perusal of his examination-in-chief does not indicate that the statement made by him i.e. statement recorded on 22.1.2001 has been put up to him and proved during his examination- in-chief. Only two documents have been proved by PW. 1 namely Exh.11 the form which the accused is claimed has given to him and Exh.12 the complaint.

14] The evidence of PW 2 Dnyaneshwar Lohi, who is the panch witness is most crucial for the reason that he is the person before whom the demand for illegal gratification is claimed to have been made. It is also material to note, that PW 2 who has been examined at Exh.17 (pg.52) was declared hostile by the learned APP who had sought permission to cross-examination him, which having being so granted, his cross-examination was conducted by the learned APP. The cross-examination by the learned APP of PW 2 runs into a mere seven

lines, in which PW 2 for the first time says that when the accused came in the room of the complainant there was a demand by him of money for the work and so also its acceptance of the money in his presence. Insofar as the demand is concerned, what is material to note is that, the statement of the PW 2 recorded on 19.1.2001 by the Investigating Officer (PW 3) was never put up to PW 2 as the examination-in-chief as well the cross-examination merely indicates that though a question was put to him as to whether his statement was recorded by the ACB which was answered in the affirmative, the statement dated 19.1.2001 was never shown to him and therefore, not marked as an exhibit at all. PW 2 has proved the panchnama Exh.18 which is panchnama - 1 (pg.55) – a pre-trial panchnama. What is also material to note is that, the panchnama – 2 which is the post trap- panchnama has also not been put up to PW 2 Dnyaneshwar Lohi. There were two witnesses to the pre-trap and post-trap panchnama namely PW 2 Dnyaneshwar Hiranman Lohi and one Gangadhar Anandarao Kindarle. Unfortunately Gangadhar Anandarao Kindarle the second witness to the pre-trap and post-trap panchnama has not been examined at all. In his cross-examination PW 2 states that, the officer from the ACB had told him on 15.1.2001 that he had received a complaint against the accused, who was a public servant and since a trap was not feasible on 16.1.2001 the PW 1 was called on next day i.e. 17.1.2001. This clearly appears to be an impossibility for

the reason that the complaint lodged by PW 1 at Exh.12 itself is dated 17.1.2001 in pursuance to which, it is claimed that the panchas were called on 18.1.2001 in the morning hours. Though PW 2, states that on 17.1.2001 powder was applied to the currency notes this was actually on 18.1.2001 and not on 17.1.2001. In his cross-examination PW 2 – Dyaneshwar Lohi has categorically admitted that though he has stated before the police that accused had demanded amount for the work of complainant however, he could not assign any reason why it was not so mentioned in his statement, which is a material omission. This position is asserted and admitted by PW 3 the Investigating Officer in his cross-examination wherein he categorically states ‘witness Lohi did not state before me that accused demanded the amount for the work of complainant’. Though Mr. Chutke learned APP for the respondent/State submits that this omission which results in contradiction on account of its being proved by Investigation Officer cannot be considered, as such a statement has to be proved in consonance with the provision of Section 145 of the Evidence Act, in light what has been stated in Section 162(1) proviso and Section 162(2) explanation of Cr. P.C. in my considered opinion, a perusal of Section 145 of the Evidence Act indicates that it can be divided into two parts and the first part indicates that a witness could be cross-examined as to his previous statements made by him in writing or reduced into writing, and relevant to matters in question,

even without such writing being shown to him, or being proved. It is thus apparent, that the omission given by PW 2, in his cross-examination that though he had stated before the police that accused had demanded amount for the work of the complainant, that was not appearing in his statement as recorded by the police, can be read and taken into consideration. The evidence of PW 2, who is the panch witness and the most crucial of all witnesses, as he was the only person present in the outer room when the accused had come into the room on 18.1.2001 with the complainant, would indicate that the demand for illegal gratification, as alleged to have been made by the accused is absent on that fateful day. Though, PW 1 states that such a demand has been made by the accused on 18.1.2001 in the presence of PW 2, however, the evidence of PW 2 considered in its entirety would indicate this was not so and therefore, there is an absence of proof of demand by the accused on 18.1.2001 when the trap was conducted.

15] What is also material to note is that panchnama – 1 at Exh.18 (pg. 55), which is dated 18.1.2001 is claimed to have been executed on 15.1.2001 as per the date given in para 1 therein by PW 2.

16] The mode of proving the panchnama would be of examining the witnesses to the panchnama, who would depose as to the correctness

of its contents. In the instance case, as indicated above, there are two panch witnesses both to the pre-trap panchnama at Exh.18 (pg.55) and to the post-trap panchnama Exh.14 (pg.36). Insofar as the pre-trap panchnama at Exh. 18 is concerned, it has been proved, by the evidence of PW 2 Dnyaneshwar Lohi one of the panch witness. However, insofar as the post-trap panchnama Exh.14 is concerned, the same was never put up to PW 2 Dnyaneshwar Lohi either in his examination-in-chief or in his cross-examination by the learned APP after he was declared hostile. Admittedly, Gangadhar Anandaro Kindarle the other witness to the panchnama – 2 has not been examined at all. The record indicates that the post-trap panchnama – 2 Exh.14 (pg.36) has been exhibited in the evidence of PW 3 the Investigating Officer Bharatbhushan Sharma Exh.22 (pg.73). In my considered opinion, in absence of the post-trap panchnama Exh.14 (pg.36) having been put up to PW 2 Dnyaneshwar Lohi the panch witness and the other witness to panchnama – 2 Exh.14 namely Gangadhar Anandrao Kindarle not having been examined, the same could not have been proved by PW 3 the Investigating Officer. Though there is an endorsement on Exh.14 the post-trap panchnama, by the learned counsel for the accused to the effect, ‘this document is admitted only to the extent of its execution and not in respect of all correctness which are hit by Section 162 Cr. P.C.’ which is dated 16.7.2009, considering that the correctness of the contents of Exh.14

were disputed it was necessary for the prosecution to prove the contents of Exh. 14 by examining the panch witness to the same which has not been so done as indicated above.

17] There is therefore serious infirmity in proving of the post-trap panchnama at Exh. 14 as discussed above, and therefore, the same could not have been taken into consideration by the learned Sessions Court to hold that the trap was successfully proved.

18] The above discussion would indicate that the basic ingredients for an offence under Sections 7, 13(1)(d) and 13(2) namely the demand of illegal gratification, has not been proved by the prosecution by an independent witness as would be necessary. Considering that reliance upon the sole testimony of the PW 1 the complainant to hold that the demand was proved would be fraught with dangerous consequences, as the complainant would always, be a person interested in ensuring that the complaint made by him would result in a conviction. So also, in absence proving the post-trap panchnama, the entire trap itself, cannot be held to have been proved.

19] Though Mr. Chutke, learned APP has relied upon ***Sakharam Jadhao*** (supra) which holds that where the statement about demand in

complaint is consistent in Court too, there is no material discrepancy and is supported by Investigating Officer, CA report and panch witness, however, on facts of the instant matter, considering that there is material omission in the testimony of PW 2, which cannot be reconciled, ***Sakharam Jadhao*** (supra) is not applicable. Similar is the position in respect of ***Bhaskar Yewle*** (supra) as the post trap panchanama has not been proved at all.

20] The contention of Mr. Naidu, learned counsel for the appellant based upon the communication dated 28/6/2004, by the Jt. C.P./Spl. I.G.P, Anti Corruption Bureau, MS, that there has to be an independent process of verification of the demand, in which the panch and the complainant have to, before the trap, approach the accused in which meeting the claim of the complainant that there was a demand by the accused for illegal gratification has to be verified from the accused, in my opinion, has no legal sanctity as it is not borne out by the provisions of the P.C. Act. Though in ***P. Sirajuddin*** (supra) and ***Bhagwant Kishore Joshi*** (supra), a word of caution was sounded by the Hon'ble Apex Court that there must be some suitable enquiry into the allegations by a responsible officer, such an enquiry may not take the form, which is being advanced by Mr. Naidu, learned counsel for the appellant as that may prove counterproductive by putting the accused on guard thereby

resulting in failure of the trap and therefore the contention is rejected.

21] A perusal of the judgment of the learned Sessions Court would indicate that it is based upon an incorrect premise for the reason that in para 8 at the start of the discussion of the reasoning itself the learned Sessions Court holds that the moment, the defence accepted that the amount was found in the custody of the accused by virtue of the trap laid, then it was for the accused to explain the purpose for which the amount was found in his possession and was accepted by him, ignoring the basic requirement of law that for a conviction under the aforesaid provisions what is necessary, is for the demand to have been proved by an independent witness, which in this case was PW 2, whose evidence in regard to the so called demand, has already been discussed above. So also, the post- trap panchnama Exh.14, has been incorrectly relied upon, merely based upon the so called admission as indicated by the endorsement thereupon ignoring the position that the endorsement itself disputed the correctness of the contents of the post-trap panchnama.

22] In view of the above discussion, in my considered opinion the judgment dated 5.9.2009, rendered by the Special Court (ACB), Nagpur, convicting the appellant for the offence under Sections 7, 13(1) (d) and 13(2) of the P.C. Act cannot be sustained, the same is hereby

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quashed and set aside. The appellant is acquitted of the aforesaid offences.

23] The criminal appeal is allowed. Pending application(s), if any, stand(s) disposed of.

(AVINASH G. GHAROTE, J.)

Sarkate.