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

CRIMINAL APPEAL NO. 552 OF 2005

Keshav Tukaram Nagpure
Aged about 67 years, Retired person from post of Surveyor, Tahasil Office, Nagpur. ... Appellant

// VERSUS //

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

Shri R.M.Daga, Advocate for appellant
Shri S.D.Sirpurkar, APP for the State / Respondent.

CORAM : ANIL S. KILOR, J.
DATED : 15th DECEMBER, 2022.

ORAL JUDGMENT :

This appeal is directed against the judgment and order dated 22nd September, 2005 passed by the Special Court designated under Prevention of Corruption Act, Nagpur in Special Case No. 6 of 1998, convicting the appellant/accused for the offence punishable under Sections 7 and 13(1)(d) read with Section 13(2) of Prevention of Corruption Act, 1988 (in short referred as “the Act of 1988”).

2. It is the case of the prosecution that from January to March 1997 accused was working as Clerk in the Office of Additional Tahasildar (non-agricultural) No. III, Nagpur. Complainant Smt. Shakuntala

Marotrao Khambadkar received notice for non-agricultural tax. The husband of complainant had died on 15th January, 1996. Before his death complainant's husband had purchased plot no.66 in Preeti Co-operative Housing Society, Hazaripahad, Nagpur. Registered sale-deed was executed on 29th December, 1992. After receipt of notice for recovery of non-agricultural tax complainant got knowledge about purchase of plot by her husband. It is alleged that on 10th December, 1996 complainant along with her son met accused in his Office. The complainant shown notice for non-agricultural tax and enquired from accused as to how much tax she was required to pay. After making calculations accused told complainant that she was required to pay Rs.2,420/- including the arrears. Accused also told her that he would do her work on total payment of Rs.925/-. Receipt would be given only for Rs.484/- and no receipt would be given for remaining Rs.441/-. Thereafter, complainant met accused in his Office on 12th March, 1997 and enquired about payment of tax. Complainant told accused she was not having amount she shall pay amount upto 15th. Again complainant asked accused that for how much amount receipt would be given. On that accused told her that receipt would be given only for Rs.484/- and no receipt would be given for Rs.441/-. The complainant was not willing to pay balance amount, demanded by accused without receipt. Therefore, she approached Anti Corruption Bureau Office, Nagpur and submitted her complaint. Deputy Superintendent of Police, Kokate recorder her complaint (Exh.20). Thereafter, the pre trap procedure was completed.

3. Around 12.00 hours complainant and her son, Panch no.1 and one lady HC left ACB office for going to Tahasil Office in Auto Rickshaw. Panch No.2 Deepak Wankhede and other members of trap party and Dy. S.P. Kokate came on motor-cycle and other vehicles. Complainant and all persons with her came to Tahasil Office. They were waiting for other members of trap party at the entrance gate. Dy. S.P. Kokate and other persons came to the entrace gate. The instructions earlier given to complainant and panchas were repeated by Deputy Superintendent of Police Kokate. On direction of Deputy Superintendent of Police Kokate Panch no.1, complainant and her son came to room no.11 to meet the accused. Other persons stayed outside. It is alleged that after the complainant met the accused she paid amount of Rs.484/-. After receiving said amount accused asked complainant that what other things he had told to her. On that complainant taken amount of Rs.441/- from her purse and given to the accused. Accused received said amount with his right hand and kept in chest pocket of his shirt. The accused had given receipt only for amount of Rs.484/-. Then complainant came to Tahasil Office and given agreed signal. After receiving signal panch no.2 Deepak Wankhede and members of trap party with Deputy Superintendent of Police Kokate rushed to the place. Panch No.1 Diwakar Ujawane pointed out towards accused, received bribe amount. ACB employee caught both hands of the accused. Dy. S.P.Kokate disclosed his identity to the accused. On direction of Dy. S.P. Kokate panch no.2 Deepak Wankhede recovered notes from pocket of accused, containing two bundles of notes, consisting Rs.484/- and

Rs.441/- respectively. PC Dhote prepared solution of Sodim Carbonate. Finger tips of both panchas and members of trap party were dipped in it. Its colour was not changed. That solution was thrown. Thereafter, the report came to be lodged.

4. Upon completion of investigation, the prosecution has filed the charge sheet against the accused before the Special Court.

5. The learned Special Court framed the charge against the accused blow Exh.13 for the offence punishable under Section 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act. The accused pleaded not guilty and claimed to be tried. Defence of accused is of total denial.

6. In order to prove the guilt the prosecution examined in all eight witnesses. PW-1 Narayan Dharma Sable, the Sanctioning Authority, PW-2 PC Prakash Pandarinath Tidke, PW-3 Shakuntala Khambadkar, who is the complainant, PW-4 Diwakar Ujawane, panch witness no.1, PW-5 Milind Khambadkar, son of complainant, PW-6 Narayan Pusadkar, the official working in the office of accused, PW-7 S.V.Kokate, Dy. Superintendent of Police and PW-8 Gawande, Investigating Officer.

7. The learned trial Court after marshelling the oral as well as documentary evidence passed the impugned judgment and order dated 22nd September, 2005 convicting the appellant/accused for the offence punishable under Sections 3, 13(1)(d) read with Section 13(2) of the

Prevention of Corruption Act, 1988 and thereby sentencing them to suffer simple imprisonment for six months and to pay fine of Rs.500/-, in default further to undergo simple imprisonment for two months. He is further convicted for the offence punishable under Section 13(1)(d) read with section 13(2) of Prevention of Corruption Act, 1988 and is sentenced to suffer simple imprisonment for two years and to pay fine of Rs.1000/- in default further undergo simple imprisonment for six months.

8. I have heard Shri R.M.Daga, learned counsel for the appellant and Shri S.D.Sirpurkar, learned Additional Public Prosecutor for the State.

9. Shri Daga, learned counsel for the appellant submits that the demand has not been proved in this case and in absence of demand, no offence constitutes under the Act of 1988.

10. He further submits that learned trial Court has not considered the law that the demand is a *sine qua non* to constitute the offence under the Act of 1988. It is pointed out that informant herself in her oral deposition made a statement that demand was made by one Gotmare and not by appellant and out of misunderstanding the complaint was made, therefore, there is no offence to establish illegal gratification. Accordingly, he submits that learned trial Court has committed error as regards to demand.

11. He further submits that it is a settled law that presumption would operate against the accused only where the foundational facts are established and in this case as foundational facts are not proved and demand is not proved, presumption will not operate against the accused. 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, learned Additional Public Prosecutor supports the impugned judgment and order and submits that the trial Court has rightly convicted the accused as the trial Court has found the evidence brought on record by the prosecution is sufficient to bring the guilt against the accused at home. He therefore prays for dismissal of the present appeal.

13. 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.

14. 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*

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

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."

15. 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."*

16. 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.

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 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.

18. It is a settled law that the demand is a *sine qua non* to constitute the offence under the Act of 1988 in this case, therefore to examine whether the demand is proved, it is necessary to consider the evidence of P.W-3 who is the informant, P.W-4 who is the shadow witness and PW-6 the son of the informant who was present at the time of trap.

19. Informant PW-3 in her deposition states that her husband has purchased the plot in P.P. Housing Society in 1992. In 1997, notice about tax of her plot was received. She went to the office of Collector for payment of tax. She met the accused and inquired about amount to be paid against the tax. Accused told her that the total amount of Rs.2,420/- be deposited by the informant. She showed her inability to pay the total amount and requested for 15 days. It is further stated that the accused told her that the amount should be deposited till 15th March, 1997. Accused told her that amount of Rs.925/- will be deposited after reducing the amount . On next day she went to the accused and asked for receipt of Rs.925/-. Thereupon, accused told her that she would give receipt of Rs.484/- only and therefore she suspected and lodged the complaint. P.W-3 further states that on the date of trap, she gave amount of Rs.484/- to the accused looking to that amount the accused said only that much amount. The accused asking informant to give remaining amount of

Rs.441/-. The accused gave receipt of Rs.484/- on the given amount of Rs.441/- to accused. P.W-3 gave amount of Rs.441/- to accused.

20. However, in cross-examination she states that it is true that on 11th March, 1997 and 12th March, 1997 she met with the clerk Mr. Gotmare. She further admits that on the date of her complaint to ACB and on its earlier date she did not met Mr. Nagpure in his office. In the complaint to ACB Office, the name of Nagpure was wrongly mentioned instead of Gotmare. She had never seen the accused and she does not identify the accused. She further states in his cross-examination that it is true that she had given complaint against the accused out of misunderstanding and the amount was taken from her by Gotmare.

21. Accordingly, she was declared hostile and cross-examination was conducted by the learned Additional Public Prosecutor. In the cross-examination of learned Additional Public Prosecutor, she states that she told the ACB Officer that her complaint was against Mr. Gotmare and not against Mr. Nagpure. She further states that she does not know whose name is Keshav Tukaram Nagpure. She further states that she did not tell ACB Officer that Mr. Nagpure made a calculation of tax amount and asked her to pay Rs.925/-. She further denied that clerk Mr. Nagpur told her that the receipt will be given of Rs.484/- and no receipt will be given for balance amount.

22. Thus, from the oral evidence of the informant nothing has been brought on record against the accused as regards demand. On the

contrary, the informant refused to identify the accused and has stated that demand was never made by the accused but it was made by one Gotmare. It was also stated that the complaint was lodged out of misunderstanding.

23. In the light of above oral testimony of PW-3 informant, I will now examine the oral testimony of PW-4, shadow witness to find out whether he corroborates the prosecution case as regards demand.

24. PW-4 in his oral testimony has stated that after searching for some thing the clerk then taken the receipt book. The clerk asked the complainant to give him amount. Complainant gave amount of Rs.484/- to him. The clerk told something to the complainant. Complainant said that she was told tax amount of Rs.484/- She paid that amount. Complainant kept that amount on the table. Appellant taken that amount and kept in his pocket. The clerk then said that he had told some other thing to her and on that complainant taken out amount from her purse and gave it to the clerk. Before that complainant had asked as to how much amount, on that the clerk had made calculation on paper and told amount to her. The clerk taken amount given by the complainant. The accused counted those notes with his both hands and kept those notes in pocket of his shirt. The clerk had given receipt of Rs.484/- to the complainant.

25. In cross-examination P.W-4 has categorically admitted that the accused did not demand specific amount from the complainant. The complainant had given the amount of Rs.484 to the accused.

26. Thus, even if the evidence of P.W-4 panch witness is examined, nothing has been brought on record that there was specific demand of Rs.441/- by the accused to the complainant. Similarly, in the evidence of P.W-5 who is the son of the complainant who was all the time with her when she visited to the Tehsil Office and thereafter office of ACB. He does not support the case of the prosecution.

27. It is a settled law that only recovery is not sufficient to establish the demand but some more evidence is required though recovery of Rs.441/- i.e. tainted amount is there. However, cogent and cognate evidence are required to establish the demand.

28. In absence of any evidence in respect of demand and considering the evidence of panch witness who has admitted that there was no specific demand of any amount, it is not safe to rest the conviction on the basis of evidence of shadow witness only. Therefore, I am of the opinion that the learned trial Court has committed error in recording the conviction on the basis of evidence of shadow witness.

29. In this case as the foundational facts are not proved, the presumption will not operate under Section 20 of the Act, 1988 against the accused.

30. 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 20th October, 2006 passed by Special Judge, Yavatmal in Special Case No. 2 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 22nd September, 2005 passed by Special Judge designated under Prevention of Corruption Act, Nagpur Yavatmal 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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