IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRA-S-1066-SB of 2005
Date of Decision: 17th November, 2022

Sushil Kumar Jindal

Appellant

Versus

State of Haryana

Respondent

CORAM: HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present: Mr. Vivek Suri, Advocate for the appellant.
Mr. Gurmeet Singh, AAG, Haryana.

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AVNEESH JHINGAN, J (Oral):

1. Aggrieved of the conviction and quantum of sentence in FIR No. 43 dated 26.8.2003, under Sections 7 and 13 of the Prevention of Corruption Act, 1988 (for short, 'the Act') registered at Police Station State Vigilance Bureau, Rohtak, the present appeal is preferred by Sushil Kumar Jindal (appellant).

2. The facts as set up by the prosecution are that a complaint was made by Krishan Kumar Tyagi who was running a shop for supplying building material in the premises of Vaidic Ashram Samiti, Panipat. The shop was on rent. The premises were located adjacent to Sky Lark Tourist Complex, Panipat (for short, 'the Complex'). The appellant was posted as Junior Engineer in the Complex, to look after the repair work. It was alleged that the appellant demanded illegal gratification of Rs.4500/- threatening that the shop is situated in the land of the Complex and he

would get it demolished. The demand was reiterated on 25.8.2003. On the basis of the complaint, a trap was laid. Radhey Sham Mittal, Naib Tehsildar-cum-Executive Magistrate was deputed as Gazetted Officer. Head Constable Rajinder Kumar was appointed as shadow witness. Six currency notes of Rs.500/- each and fifteen currency notes of the denomination of Rs.100/- each were laced with Phenolphthalein Powder and initialled. The complainant was instructed to hand over the laced currency on demand. The shadow witness was directed to hear the conversation and to give signal to the raiding party, on acceptance of the amount by the appellant. On a signal from the shadow witness, the raiding party apprehended the appellant. The laced currency was recovered from the pocket of the pant of the appellant. On washing of the hands and pocket of the pant of the appellant with Sodium Carbonate solution, the colour turned pinkish.

3. The prosecution to support its case examined nine witnesses. The complainant was declared hostile.

4. In statement under Section 313 Cr.P.C., the appellant stated that shop of the complaint was situated outside the premises of the Complex and he had no concern with the same. He further stated that he was on visiting terms with the complainant who had borrowed Rs.4500/- from him. There was an altercation with regard to return of the amount. On 26.8.2003, when the complainant returned the loan amount the officials of the raiding party apprehended him.

5. In his defence, the appellant examined Dharampal Gupta, Counter Incharge of the Complex as DW1.

6. The trial court noted that the complainant turned hostile but

relying upon the depositions of PW5-Radhey Sham Mittal, Naib Tehsildar-cum-Executive Magistrate, the Investigating Officer, by drawing the presumption under Section 20 of the Act against the appellant and rejecting the defence taken, convicted him under Sections 7 and 13(1)(d) of the Act vide judgment dated 2.6.2005. Vide order of even date, the appellant was sentenced as under:

Section	Sentence	Sentence in default of payment of fine
Section 7 of the Act	Undergo rigorous imprisonment for one year and fine of Rs.1000/-	To further undergo rigorous imprisonment for three months
Section 13(1)(d) of the Act	Undergo rigorous imprisonment for two years and fine of Rs.1000/-	To further undergo rigorous imprisonment for three months

7. Learned counsel for the appellant submits that the complainant in the cross-examination admitted the fact that he had borrowed loan from the appellant. He further submits that the prosecution failed to prove the demand and the trial court erred in convicting the appellant on the basis of recovery only. Contention in that in present case, presumption under Section 20 of the Act cannot be drawn against the appellant. The defence taken by appellant was substantiated by the deposition of DW1.

8. Learned counsel for the State defends the impugned judgment. He submits that in complaint it was specifically mentioned that appellant demanded illegal gratification. Complainant has not denied his signatures on the complaint and the memo . He further submits that the complainant in his examination-in-chief has supported the case of the prosecution. The contention is that the official witnesses substantiated the procedure adopted prior to of laying the trap and after recovery of the tainted currency from

the appellant. No specific date was mentioned by the appellant in his statement under Section 313 Cr.P.C. that as to when the amount was borrowed by the complainant.

9. Heard learned counsel for the parties and perused the record.

10. The allegation against the appellant was that he posted as Junior Engineer in the Complex demanded illegal gratification of Rs.4500/- from the complainant for not demolishing his shop. The complainant was declared hostile, during his deposition though in examination-in-chief he reiterated the allegation but changed the version during cross-examination.

11. The shadow witness PW-8 in his deposition has not specifically stated that illegal gratification was demanded by the appellant. The relevant portion of his testimony is quoted below:

> *"After about half an hour, accused present in the court room entered the shop of the complainant and enquired from Krishan Kumar whether his work had been done and Krishan Kumar replied that he had brought the amount as per his directions. He handed over those very currency notes to the accused. Accused kept that amount on the side pocket of the pant worn by him."*

12. It would not be out of place to mention that the shadow witness was not present inside the shop where the complainant handed over the laced currency to the appellant. He was standing outside the shop. It is not the case of the prosecution that other members of the raiding party were witnesses to the demand and acceptance of the laced currency. There is contradiction between the depositions of PW5-Radhey Sham Mittal and other officials. As per Naib Tehsildar, the shadow witness was instructed to keep a watch on the appellant and the complainant, whereas the other

official witnesses stated that he was instructed to hear the conversation.

13. The prosecution failed to prove that the appellant had an official capacity to demolish the shop of the complainant or to get it vacated. From the deposition of PW7-Navneet Singla, Secretary of Vaidic Ashram Samiti, it is clear that kotha of the complainant was having adjoining wall of the Complex and was not part of the Complex. In his cross-examination, he stated that no notice for demolition of the shop was ever received from the Tourism Department. With this testimony, the occasion for the appellant to demand illegal gratification becomes doubtful.

14. Law is well settled that the defence taken by the accused has to be a probable defence and is not to be proved beyond reasonable doubt. In **State of Punjab v. Madan Mohan Lal Verma, (2013) 14 SCC 153,** the Supreme Court held as under:

> *"11. The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the Act 1988. 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 Act 1988, 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 Act 1988. 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*

> *<u>prosecution</u>. 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.*
>
> *(Emphasis supplied)*

15. The defence taken by the appellant was substantiated by the testimony of DW1-Dharampal Gupta who stated that in his presence, the complainant had borrowed the loan of Rs.4500/- from the appellant. The defence of the appellant was that the complainant had returned the borrowed amount.

16. There is no dispute on the proposition that presumption under Section 20 of the Act can be drawn against the accused only if the acceptance of the bribe is proved. Reference be made to the judgment of Supreme Court in **<u>B. Jayaraj v. State of A.P., 2014(2)</u> R.C.R. (Criminal) 410.**

17. In the case in hand, in the absence of proof of acceptance of the amount by the appellant as an undue advantage or illegal gratification, the presumption cannot be drawn against him.

18. Investigating Officer- PW9- Surinder Kumar in his examination-in-chief reiterated the allegations in complaint and the procedure adopted. In his cross-examination, he stated that he had made no investigation on the factual aspect as to whether kotha of the complainant was part of the Complex or these were two independent entities. Further the that he had not received any complaint from the, Secretary of the Samiti that the tenant (complainant) was being threatened for demolition. The relevant part of PW- 7 his cross-examination is quoted below:

"The kotha of Krishan Kumar Tyagi is situated within the boundary wall of the area of our Samiti."

19. Considering the facts and re-appreciating the evidence, it is clear that the prosecution failed to prove the demand and acceptance of illegal gratification. It was not established that the appellant was having an official capacity to demolish or to get the shop of the complainant vacated. Proving of demand and acceptance is *sine qua non* for conviction under the Act. Reference can be made to the decision of Supreme Court in **N. Sunkanna v. State of Andhra Pradesh, 2015(4) RCR (Criminal) 797.** The judgment of conviction and order of sentence cannot be sustained and are set aside.

20. The appeal is allowed.

[AVNEESH JHINGAN]
JUDGE

17th November, 2022
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1. Whether speaking/ reasoned : Yes
2. Whether reportable : Yes