



Judgment

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

CRIMINAL APPEAL NO.202 OF 2005

~~Babarao s/o Shyamrao Vitalkar,
aged about 64 years,
occupation retired government servant,
r/o plot No.130,
Shreekrishna Nagar,
Nagpur — 440 009.~~

Dead through LR's

Legal Heirs of the appellant :

1(A) Mrs.Asha Babarao Vitalkar,
aged about 70 years, r/o plot No.130,
Shrikrishna Nagar, Nagpur-440 009.

1(B) Mrs.Pallavi D.Kale,
age about 50 years, r/o Madapar,
Bhuj, Gujrat.

1(C) Mr.Nitin Babarao Vitalkar,
age about 48 years, r/o plot No.130,
Shrikrishna Nagar, Nagpur-440 009.

1(D) Mr.Vinay Babasaheb Vitalkar,
age about 44 years, r/o plot No.130,
Shrikrishna Nagar, Nagpur-440 009.

..... **Appellants.**

:: VERSUS ::

State of Maharashtra,
Through Anti Corruption Bureau,
Nagpur.

..... **Respondent.**

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Shri A.V.Gupta, Senior Counsel assisted by Shri
P.S.Khubalkar, Counsel for the Appellants.
Shri A.M.Kadukar, Additional Public Prosecutor for the State.
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CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 13/07/2023
PRONOUNCED ON : 30/08/2023

JUDGMENT

1. The appellant (accused) has challenged judgment and order of conviction and sentence dated 28.2.2005 passed by learned Judge, Special Court, designated under The Prevention of Corruption Act, 1988 (learned Judge of the trial court), Nagpur in Special Case No.5/1996.

2. By the said judgment and order of conviction impugned, learned Judge of the trial court convicted the accused for offence punishable under Section 7 of the Prevention of Corruption Act, 1988 (the said Act) and sentenced him to suffer simple imprisonment for one year and to pay fine Rs.1000/-, in default, to suffer simple imprisonment for three months.

Learned Judge of the trial court also convicted the accused for offence punishable under Section 13(1)(d) read with Section 13(2) of the said Act and sentenced him to suffer simple imprisonment for three years and to pay

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fine Rs.2000/-, in default, to undergo simple imprisonment for six months.

Learned Judge of the trial court also directed that all the sentences shall run concurrently.

3. During pendency of the appeal, the accused died and his legal heirs proceeded with the appeal with leave of the court.

4. Brief facts of the prosecution case run, as under:

The accused at the material time was working as Assistant Sub Register, Cooperative Societies at Saoner. Pawan Jagmohan Jaiswal (informant) approached the accused for obtaining Money Lending Licence. As per allegations, the accused informed him that he has to deposit Rs.200/- by challan in the State Bank of India and handed over him a printed form. Accordingly, the informant deposited Rs.200/- by challan and applied for Money Lending Licence. The informant had submitted copies of challan; application; consent letter; affidavit, and court fee stamps. The informant was further informed by the accused

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that he has to spend some amount for recommendation for the licence. The informant approached to the accused on 25.7.1994 and informed that he had submitted an application and copies of challan. As per instructions of the accused, the informant further submitted an affidavit.

5. It is further alleged that the accused called the informant in his chamber and demanded amount Rs.3000/- for recommendation of the licence. The informant requested to reduce the amount. However, the accused told him that he has to come with amount Rs.3000/- on 26.7.1994. As the informant was not willing to pay the amount, he approached to the Office of the Anti Corruption Bureau at Nagpur on 25.7.1994 and lodged a report.

6. After receipt of the report, officers of the Anti Corruption Bureau called two panchas. In presence of the panchas, the informant has narrated the incident which was verified by the panchas from the First Information Report. After following due procedure, it was decided to conduct a raid and the panchas and the informant were called on

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26.7.1994. On 26.7.1994, panchas read the complaint and verified contents of the complaint. The informant produced tainted five currencies denomination of Rs.500/- and five currencies denomination of Rs.100/- and numbers of the currencies were noted. The demonstration as to use and characteristics of phenolphthalein powder and sodium carbonate was shown. The said solution was applied on the tainted amount and kept in shirt pocket of the informant. The instructions were given to pancha No.1 Khobragade to stay with the informant and pancha No.2 was asked to stay along with raiding party members. The informant was further instructed to hand over the amount only on demand. Accordingly, pre-trap panchanama was drawn.

7. After pre-trap panchanama, the informant along with the panchas and raiding party members went at the office of the accused. He along with pancha No.1 visited the office of the accused and the accused demanded the amount and the informant handed over the same to him. The accused was caught after the informant was given signal to the raiding party members. Pancha No.1 disclosed as to

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demand and acceptance. The hands of the accused were examined and tainted amount was recovered from the shirt pocket of the accused. Accordingly, post-trap panchanama was drawn. The officer of the Anti Corruption Bureau lodged report about the said incident, seized relevant documents, and sanction was obtained to prosecute the accused. After completion of the investigation, chargesheet was filed against the accused.

8. During the trial, the prosecution examined in all seven witnesses, viz. Vikas Pandharinath Tidke (PW1) vide Exhibit-16; Pawan Jagmohan Jaiswal (PW2) vide Exhibit-20, the informant; Uddhav Natwalu Khobragade (PW3) vide Exhibit-31, the shadow pancha; Sheshrao Deorao Nimbalkar (PW4) vide Exhibit-39; Dudharam Tikaram Bhagat (PW5) vide Exhibit-42, pancha No.2; Narayan Anant Joshi (PW6) vide Exhibit-43, the sanctioning authority, and Sheshrao Janrao Patil (PW7) vide Exhibit-47, the investigating officer.

9. Besides the oral evidence, the prosecution further relied upon complaint Exhibit-49; letter from the

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Joint Register of the Cooperative Societies Exhibit-51; Chemical Analyzer's Report Exhibit-52; letter to Chemical Analyzer Exhibit-53; letter to the Divisional Registrar Exhibit-54; letter to the Director General Exhibit-55; pre-trap panchanama Exhibit-32; seizure memo Exhibits-33 to 36; map of office of the accused Exhibit-37, post-trap panchanama Exhibit-38; the sanction order Exhibit-45, and letter forwarding the sanction order Exhibit-46.

10. After considering the evidence adduced during the trial, learned Judge of the trial court held the accused guilty and convicted and sentenced him as the aforesaid.

11. I have heard learned Senior Counsel Shri A.V.Gupta for the accused and learned Additional Public Prosecutor Shri A.M.Kadukar for the State. I have been taken through the entire evidence so also the judgment and order of conviction and sentence impugned in the appeal.

12. Learned Senior Counsel for the accused submitted that the judgment and order of conviction impugned is not in accordance with law. There was no valid

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sanction and the prosecution also failed to prove the demand and the acceptance of the bribe. He submitted that as a matter of fact, even the sanction to prosecute the accused, as contemplated under Section 19 of the said Act, was bad in law and, therefore, the conviction of the accused stood vitiated on that ground itself. He further submitted that the accused was not authority to issue the licence and, therefore, no question of demanding the amount by the accused for issuing the licence arises. As far as the previous demand is concerned, the evidence of the informant shows that he was accompanied by one Sujit Bagde, who was an independent witness on demand. Said Sujit Bagde is not examined. The Investigating Officer recorded his statement. However, he was not examined and, therefore, makes the prosecution doubtful. Moreover, there is a variance between the version of the informant and the shadow witness. In the light of the said variance, the informant cannot be believed. Learned Senior Counsel also submitted that conversation at the time of the trap and the demand is not proved. In absence of the demand, acceptance becomes irrelevant.

Thus, for all above reasons, the case of the prosecution fails and the accused is to be acquitted.

13. In support of his contentions, learned Senior Counsel for the accused placed reliance on following decisions:

1. Tryambak Lilaji Binnar vs. State of Maharashtra¹;

2. Dattatraya s/o Rajaram Thaokar vs. The State of Maharashtra²;

3. State of Punjab vs. Sohan Singh³;

4. Suryabhan vs. State of Maharashtra⁴;

5. Panalal Damodar Rathi vs. State of Maharashtra⁵;

6. Suresh Prasad s/o Shri Vallabh Vyas vs. The Dy. Superintendent of Police, Central Bureau of Investigating ACB Sleuth, Nagpur⁶;

7. Mukhtiar Singh (since deceased) through his LR vs. State of Punjab⁷;

8. State of Karnataka vs. Ameerjan⁸, and

1 2002(3) Mh.L.J. 293

2 Criminal Appeal No.21 of 2002 decided by this court at Principal Seat on 29.8.2017

3 (2009)6 SCC 444

4 1995 Cri.L.J.107

5 (1979)4 SCC 526

6 Criminal Appeal NO.476/2009 decided by single bench this court on 27.7.2018

7 2017 SCC ONLine SC 742

8 (2007)11 SCC 273

10**9. Anand Murlidhar Salvi vs. State of Maharashtra⁹.**

14. *Per contra*, learned Additional Public Prosecutor for the State submitted that not only informant PW2 Pawan Jaiswal but also shadow pancha PW3 Uddhav Khobragade proves that there was demand and in pursuance of the said demand, the amount was accepted. Thus, the prosecution has proved the demand as well as the acceptance. He further submitted that as far as submissions of learned Senior Counsel, as to the nature of the work of the accused, are concerned, he was holding power to withhold application which was filed for licence and, therefore, the accused was certainly an authority to recommend the licence of the informant and, therefore, the demand was made. The acceptance is proved not only by the evidence of informant PW2 Pawan Jaiswal and shadow pancha PW3 Uddhav Khobragade but also through forensic evidence. The sanction order is valid and, therefore, no interference is called for in the judgment and order passed by learned Judge of the trial court.

9 2021 SCC OnLine Bom 237

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15. In support of his contentions, learned Additional Public Prosecutor for the State placed reliance on the decision of the Honourable Apex Court in the case of **Neeraj Dutta vs. State (Govt.of NCT of Delhi)**¹⁰.

16. Since question of validity of the sanction has been raised as a primary point, it is necessary to discuss an aspect of sanction. The sanction order was challenged on the ground that the sanction was accorded without application of mind and mechanically and, therefore, it is not a valid sanction.

17. On the point of valid sanction, learned Senior Counsel for the accused placed reliance on the decisions of the Honourable Apex Court in the cases of **State of Karnataka vs. Ameerjan** and **Anand Murlidhar Salvi vs. State of Maharashtra** cited *supra*.

18. In order to prove the sanction order, the prosecution placed reliance on the evidence of sanctioning authority PW6 Narayan Joshi examined vide Exhibit-43. As

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per his evidence, he was working as an Additional Secretary in the Ministry of Cooperation and Textiles. In September 1995, a proposal was received from the office of the Anti Corruption Bureau, Nagpur for according the sanction of the prosecution of the accused along with documents. The said proposal is at Exhibit-44. He read over the said documents. As per the procedure, the proposal and the bunch of documents were submitted to the Department of Law and Judiciary. An advice of the Department of Law and Judiciary was received and the same was examined by his department and by him. He examined statements of witnesses and satisfied that *prima facie* offence was made out against the accused. As the accused was Class-II officer, he had submitted papers for approval and the sanction was approved by Minister and, thereafter, he signed the sanction order. The sanction order was sent to Anti Corruption Bureau. The sanction order is at Exhibit-45 and forwarding letter is at Exhibit-46. During his cross examination, it came on record that the Department of Law and Judiciary may have maintained papers regarding the

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advice given by them. No separate record is maintained by the Minister. He specifically admitted that except the sanction order and bunch of investigating papers, no other document was sent from his department to the Anti Corruption Bureau, Nagpur. He further admitted that the approval of the Minister is not referred in the documents or in the sanction order.

On the basis of the above evidence, the prosecution claimed that the prosecution has proved the sanction order.

19. Perusal of the sanction order reveals that in first para of the said sanction order, it is mentioned that the accused is serving as an Assistant Register. In second para, it is mentioned that it appears to the Government of Maharashtra that during the aforesaid period and at the aforesaid place, the accused committed offences punishable under Sections 7 and 13(2) read with Section 13(1)(d) of the said Act. In the next para, it is mentioned that the Government of Maharashtra having fully examined material

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before it and considering all facts and circumstances disclosed therein, is satisfied that there is *prima facie* case made out against the accused person and it is necessary in the interest of justice that the accused person should be prosecuted in the court of contempt jurisdiction for the said offences. The last para shows that in exercise of powers conferred by clause (b) of sub-section (1) of Section 197 of the Code of Criminal Procedure and clause (b) of sub-section (1) of the Section 19 of the said Act, the Government of Maharashtra hereby accords sanction to the prosecution against the accused person for the said offences for taking cognizance in the court of competent jurisdiction.

20. Thus, the entire sanction order nowhere discloses that it is sanctioning authority PW6 Narayan Joshi, who has perused the said document, applied his mind, and, thereafter, accorded the sanction.

21. Whether the sanction is valid or not and when the sanction can be called as valid, the same is settled by

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the various decisions of the Honourable Apex Court as well as this court.

22. The Honourable Apex in the case of **Mohd.Iqbal Ahmad vs. State of Andhra Pradesh**¹¹ has held that what the Court has to see is whether or not the sanctioning authority at the time of giving the sanction was aware of the facts constituting the offence and applied its mind for the same and any subsequent fact coming into existence after the resolution had been passed is wholly irrelevant. The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to government servants against frivolous prosecutions and must therefore be strictly complied with before any prosecution can be launched against the public servant concerned.

23. The Honourable Apex Court, in another decision, in the case of **CBI vs. Ashok Kumar Agrawal**¹² has held that sanction lifts the bar for prosecution and, therefore, it is not

¹¹ 1979 AIR 677

¹² 2014 Cri.L.J.930

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an acrimonious exercise but a solemn and sacrosanct act which affords protection to the government servant against frivolous prosecution. There is an obligation on the sanctioning authority to discharge its duty to give or withhold sanction only after having full knowledge of the material facts of the case. The prosecution must send the entire relevant record to the sanctioning authority including the FIR, disclosure statements, statements of witnesses, recovery memos, draft charge sheet and all other relevant material. It has been further held by the Honourable Apex Court that the record so sent should also contain the material/document, if any, which may tilt the balance in favour of the accused and on the basis of which, the competent authority may refuse sanction. The authority itself has to do complete and conscious scrutiny of the whole record so produced by the prosecution independently applying its mind and taking into consideration all the relevant facts before grant of sanction while discharging its duty to give or withhold the sanction. The power to grant sanction is to be exercised strictly keeping in mind the public

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interest and the protection available to the accused against whom the sanction is sought. The order of sanction should make it evident that the authority had been aware of all relevant facts/materials and had applied its mind to all the relevant material. In every individual case, the prosecution has to establish and satisfy the court by leading evidence that the entire relevant facts had been placed before the sanctioning authority and the authority had applied its mind on the same and that the sanction had been granted in accordance with law.

24. The Honourable Apex Court in the case of **State of Karnataka vs. Ameerjan** cited supra, as relied upon by learned Senior Counsel for the accused, held that it is true that an order of sanction should not be construed in a pedantic manner. But, it is also well settled that the purpose for which an order of sanction is required to be passed should always be borne in mind. Ordinarily, the sanctioning authority is the best person to judge as to whether the public servant concerned should receive the protection under the Act by refusing to accord sanction for his

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prosecution or not. For the aforementioned purpose, indisputably, application of mind on the part of the sanctioning authority is imperative. The order granting sanction must be demonstrative of the fact that there had been proper application of mind on the part of the sanctioning authority.

25. The view in the case of **State of Karnataka vs. Ameerjan** is the similar view expressed by this court in the case of **Anand Murlidhar Salvi vs. State of Maharashtra**, cited *surpa*, as relied upon by learned Senior Counsel for the accused.

26. This court in the case of **Vinod Savalaram Kanadkhedkar vs. The State of Maharashtra**¹³ observed that absence of description of documents referred by sanctioning authority and only considering the grievances made by Complainant would show lack of application of mind by competent authority while according sanction. The documents other than complaint were taken into

13 2016 ALL MR (Cri) 3697

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consideration those documents should have been referred in the sanction order. The sanction order is illegal and invalid.

27. In view of the settled principles of law, it is crystal clear that the sanctioning authority has to apply his own independent mind for generation of its satisfaction for sanction. The mind of the sanctioning authority should not be under pressure and the said authority has to apply his own independent mind on the basis of the evidence which came before it. An order of sanction should not be construed in a pedantic manner. The purpose for which an order of sanction is required, the same is to be borne in mind. In fact, the sanctioning authority is the best person to judge as to whether public servant concerned should receive protection under the said Act by refusing to accord sanction for his prosecution or not.

28. Thus, the application of mind on the part of the sanctioning authority is imperative. The orders granting sanction must demonstrate that he/she should have applied his/her mind while according sanction.

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29. After going through the evidence of sanctioning authority PW6 Narayan Joshi, though he stated that he has applied his mind and perused the investigation papers, the sanction order nowhere discloses that it was he who applied his mind by perusing the investigation papers. The wording used in the sanction order is that the Government of Maharashtra, having fully examined the material before it, is satisfied that there is *prima facie* case made out against the accused and the sanction is accorded. Perusal of the sanction order shows that he has not disclosed on what basis he came to conclusion that the sanction has to be accorded. The sanction order only shows that the Government of Maharashtra applied his mind and accorded the sanction. The evidence of sanctioning authority PW6 Narayan Joshi discloses that the opinion of the Department of Law and Judiciary was obtained and approval of the Minister of Cooperative is also obtained. However, there is no reference of these activities in the sanction order. The sanction order discloses that the material was examined by the Government of Maharashtra and the satisfaction for

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according of sanction was also arrived at by the Government of Maharashtra. The sanction order does not specifically mentioned name of any officer who had actually undertaken the exercise of examining the material and recording the subjective satisfaction in this regard on behalf of the Government of Maharashtra. It is not known as to who has applied his mind and by what process exactly an opinion was formed that a *prima facie* case was made out for according sanction. The evidence of sanctioning authority PW6 Narayan Joshi shows that the opinion of the Department of Law and Judiciary is sought which was not produced in the evidence by the prosecution. If it would have been produced, sufficient light perhaps could have been thrown on the exercise undertaken for according of sanction of the prosecution of the accused by the Government of Maharashtra. Admittedly, the grant of sanction is a serious exercise of power by the competent authority. It has to be apprised of all the relevant materials and on such materials the authority has to take a conscious decision as to whether the facts would show the commission of the offence under

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the relevant provisions. No doubt, elaborate discussion is not required, however, the decision making on relevant materials should be reflected in the order.

30. After going through the evidence of sanctioning authority PW6 Narayan Joshi, admittedly, the sanction order nowhere reflects who has applied mind and which documents are considered by the sanctioning authority and on what basis the sanctioning authority came to the conclusion that the sanction is to accorded to launch prosecution against the accused. There is no finding by learned Judge of the trial court as to the validity of the sanction.

31. Besides the issue of sanction, the prosecution claimed that the accused has demanded gratification amount and accepted the same. To prove the demand and acceptance, the prosecution mainly placed reliance on informant PW2 Pawan Jaiswal, examined vide Exhibit-20, and shadow pancha PW3 Uddhav Khobragade, examined vide Exhibit-31.

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The evidence of PW2 reflects that he runs a hotel at Saoner and he was intending to obtain Money Lending Licence and, therefore, he approached to the office issuing Money Lending Licence and submitted an application. The accused who was working in the office informed him about the procedure. After complying the procedure, he submitted an application along with an affidavit. He had also deposited the required fees for obtaining the said licence. Regarding the demand, his evidence is to the extent that on the day of his first visit, the accused has demanded amount Rs.3000/- from him. The said demand was repeated on 25.7.1994 and, therefore, he approached the office of the Anti Corruption Bureau and filed the complaint. His evidence further discloses the procedure carried out by the officer of the Anti Corruption Bureau prior to conducting the raid. As far as the subsequent demand is concerned, his evidence is that he along with pancha No.1 visited the office of the accused and after greeting to each other, he enquired the accused about his work and the accused told him that the half work was done and the accused demanded the amount

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from him. Accordingly, he has handed over the amount to the accused and the accused kept it in his shirt pocket. The said amount was recovered from the shirt pocket of the accused by the officers of the Anti Corruption Bureau.

32. During the cross examination, it came on record that the accused has informed informant PW2 Pawan Jaiswal regarding the requirement to obtain the said licence. The informant further admitted that he is unable to recollect whether he visited in the office of the accused 15.7.1994. His cross examination further discloses that on 25.7.1994 he was asked to submit a consent letter of his wife. Accordingly, he submitted the consent letter on 25.7.1994. His friend Sujit Bagde accompanied him on 15/7/1994. On 26.7.1994 also, he met the accused and the accused has recorded his statement which is at Exhibit-29. Thus, the cross examination shows that initially he visited on 15.7.1994 along with one Sujit Bagde when first time the said demand was made. Thereafter on 25.7.1994, he visited the office of the accused and the accused demanded from him the gratification amount.

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33. It is pertinent to note that though informant PW2 Pawan Jaiswal approached the office of the Anti Corruption Bureau on 25.7.1994 itself, again he visited the office of the accused on 26.7.1994, the day on which his statement was recorded by the accused to comply his application. As per the evidence of PW2, the accused told him that he should come with amount and, thereafter, his work would be looked into. However, his cross examination shows that before accepting the amount on 26.7.1994, the accused has recorded his statement to comply requirement of issuing him licence. This conduct of the accused is to be taken into consideration while appreciating the evidence regarding the acceptance and demand.

34. To corroborate the version of informant PW2 Pawan Jaiswal, the prosecution has examined PW3 Uddhav Khobragade, who acted as a pancha on pre-trap as well as post-trap panchanama.

The evidence of PW3 Uddhav Khobragade, as to the pre-trap panchanama, shows that as per the direction of

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his superior, he approached the office of the Anti Corruption Bureau to act as pancha. The officer of the Anti Corruption Bureau gave him two complaints of informant PW2 Pawan Jaiswal for reading. He read both the complaints. As per the allegations in the complaint, the informant approached the office of the accused to obtain Money Lending Licence and the accused demanded from him Rs.3000/- as gratification amount for recommendation. The informant narrated the incident to him. He had also taken personal search of the informant. He further narrated about events happened during the pre-trap panchanama. His further evidence discloses that along with the informant he visited the office of the accused. There was a communication between the informant and the accused. The accused handed over some documents and obtained the informant's signatures on it. Thereafter, the informant enquired with him whether all formalities have been completed and the accused replied that a important formality is yet to be completed and demanded the amount from the informant. The said amount was demanded for recommendation of

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Money Lending Licence. Thereafter, the informant handed over the amount to the accused. The raiding party members caught the accused and tainted amount was recovered from the accused. His further evidence is regarding the seizure of the amount and seizure of documents from the office of the accused by drawing necessary panchanamas.

This witness, during cross examination, admitted that the complaint lodged was not given to him. It was also not informed against whom the said complaint was received, how much amount was demanded, and who had demanded the amount. During the cross examination it further came on record that the informant had gone to the office of the accused five to seven days back. At that time, the demand was made. Thereafter, the pancha stated about the communication took place between the accused and the informant.

It is submitted by learned Senior Counsel for the accused that as far as the evidence of informant PW2 Pawan

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Jaiswal and pancha PW3 Uddhav Khobragade is concerned, it is not corroborative and there is a variance in their evidence. He pointed out that the informant stated that after meeting, there was a communication between him and the accused that he came yesterday, but he was not found (the accused). The accused said that he had given telephonic call to the informant. The informant told the accused that he had gone outside.

Whereas, pancha PW3 Uddhav Khobragade narrated about the communication that the informant said to the accused that on earlier date he had come, but he did not meet (there is no reference to any reply by the accused to this).

The further variance pointed out by learned Senior Counsel for the accused is that the informant has stated that he asked the accused in how many days he would get the licence. Whereas, this fact is not narrated by the pancha. The informant stated that the accused said that he had not done the work of the informant. The informant

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asked the accused what formality remained to be done. Whereas, pancha PW3 has stated that the informant asked the accused whether all formalities of the work were completed. The accused said that important formality was not completed. The informant asked what formality is to be completed. It is further pointed out that as per the evidence of the informant, the accused asked whether he brought the amount for him which is not stated by the pancha. The informant stated that he asked the accused how much amount would be required, the same is not stated by pancha PW3. The informant stated that the accused said that he had told the amount to him. Whereas, pancha PW3 has stated that the accused said that yesterday he told him to bring amount of Rs.3000/- for the Money Lending Licence.

Learned Senior Counsel for the accused further pointed out that as per the evidence of the informant, the accused said that he was taking Rs.3500/- from others. But, as the informant is journalist, he is taking Rs.3000/-. Whereas, panchas PW3 has stated that the informant said

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that the amount was more and some concession be given. The accused said that amount Rs.3000/- was required for recommendation of the Money Lending Licence. When the informant said that the amount was more, the accused said that he was taking Rs.3500/- from others and as the informant was journalist, he was taking Rs.3000/- from him. As per the evidence of the informant, he had asked the accused when he would get the licence and the accused told that a meeting would be held and he would get licence in fifteen days.

35. Thus, learned Senior Counsel submitted that the evidence of informant PW2 Pawan Jaiswal and pancha PW3 Uddhav Khobragade is not consistent on material point. It should corroborate to each other in material particulars. For that purpose, he placed reliance on the decision of the Honourable Apex Court in the case of **Panalal Damodar Rathi vs. State of Maharashtra** cited *supra* wherein it is held that there could be no doubt that the evidence of the complainant should be corroborated in material particulars. After introduction of Section 165-A of the Indian Penal Code

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making the person who offers bribe guilty of abetment of bribery, the complainant cannot be placed on any better footing than that of an accomplice and corroboration in material particulars connecting the accused with the crime has to be insisted upon. The evidence of the complainant regarding the conversation between him and the accused has been set out earlier. As the entire case of the prosecution depends upon the acceptance of the evidence relating to the conversation between the complainant and the appellant during which the appellant demanded the money and directed payment to the second accused which was accepted by the complainant, we will have to see whether this part of the evidence of the complainant has been corroborated. The Honourable Apex Court held that it should corroborate to each other.

Learned Senior Counsel further placed reliance on the decision of the Honourable Apex Court in the case of **Mukhtiar Singh (since deceased) through his LR vs. State of Punjab** cited *supra* wherein also it is held that the statement of complainant and inspector, the shadow witness in

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isolation that the accused had enquired as to whether money had been brought or not, can by no mean constitute demand as enjoined in law. Such a stray query ipso facto in absence of any other cogent and persuasive evidence on record cannot amount to a demand to be a constituent of the offence.

36. While deciding the issue involving the offence under the said Act, a fact required to be considered is that the evidence of informant PW2 Pawan Jaiswal will have to be scrutinized meticulously. The testimony of such person requires careful scrutiny.

37. In the case of **M.O.Shamsudhin vs. State of Kerala¹⁴**, it has been held that word "accomplice" is not defined in the Evidence Act. It is used in its ordinary sense, which means and signifies a guilty partner or associate in crime. Reading Section 133 and Illustration (b) to Section 114 of the Evidence Act together the courts in India have held that while it is not illegal to act upon the uncorroborated testimony of the accomplice the rule of

¹⁴ (1995)3 SCC 351

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prudence so universally followed has to amount to rule of law that it is unsafe to act on the evidence of an accomplice unless it is corroborated in material aspects so as to implicate the accused.

38. In the case of **Bhiva Doulu Patil vs. State of Maharashtra**¹⁵ wherein it has been held that the combine effect of Sections 133 and 114, illustration (b) may be stated as follows:

“According to the former, which is a rule of law, an accomplice is competent to give evidence and according to the latter which is a rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the Courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars.”

39. Thus, in catena of decisions, it is held that the complainant himself is in the nature of accomplice and his story *prima facie* suspects for which corroboration in material particulars is necessary.

15 1963 Mh.L.J. (SC) 273

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40. In the present case, learned Senior Counsel for the accused rightly pointed out that there is a variance in the evidence of informant PW2 Pawan Jaiswal and shadow pancha PW3 Uddhav Khobragade on material particulars as far as the communication between the informant and the accused is concerned. It is pertinent to note that though the informant has approached the office of the Anti Corruption Bureau and filed the complaint, there was no occasion for him to visit the office of the accused on 26.7.1994. His evidence shows that on 26.7.1994, he visited the office of the accused. The accused has recorded his statement. This evidence shows that the accused has taken the steps to complete his work before the demand is fulfilled. The cross examination of the pancha further shows that the accused has taken some documents and obtained the informant's signatures on it, which also points out that the accused has handed over the documents to the informant prior to fulfillment of his demand.

41. As far as the earlier demand by the accused is concerned, it is deposed that one Sujit Bagde was present

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along with him. The investigating officer has also admitted during his evidence that it reveals to him during the investigation that said Sujit Bagde accompanied the informant on earlier occasion when first time the demand was made. The investigating officer has recorded his statement, but independent witness said Sujit Bagde is not examined by the prosecution without giving any explanation.

42. Learned Senior Counsel for the accused placed reliance on the decision in the case of **Tryambak Lilaji Binnar vs. State of Maharashtra** cited supra wherein this court held that the prosecution has chosen not only not to examine him but it appears that even his statement was not recorded during the course of investigation and no attempt was made by the Investigating Officer to get himself satisfied regarding the complainant's assertion of demand having come from the appellant for illegal gratification. While considering the evidence of prosecution it is necessary to bear in mind the importance of evidence of prior demand which if trustworthy

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makes the trap a legitimate to eradicate corruption otherwise it could be an illegitimate trap.

He further placed reliance on the decision in the case of **State of Punjab vs. Sohan Singh** cited *surpa* wherein also the Honourable Apex Court considered the aspect of non examination of independent witness and held that independent witness drawn by the raiding party not examined on the ground that he was won over.

43. In the present case, the evidence of informant PW2 Pawan Jaiswal also shows that at the time of initial visit to the office of the accused, when the accused has demanded the amount, Sujit Bagde was along with him. Said Sujit Bagde, who is independent witness, is not examined by the prosecution to prove the earlier demand.

44. It is pertinent to note that informant PW2 Pawan Jaiswal has visited the office of the accused prior to 5-6 days of the raid. After appreciating the evidence adduced by the prosecution, the evidence of the informant shows that the accused informed him that he has to incur expenses of

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Rs.3000/- to obtain the Money Lending Licence. The complaint was not lodged immediately. As far as the second demand is concerned, the evidence of shadow pancha PW3 Uddhav Khobragade is not corroborating on a material particular. There is a variance as regards the communication between the informant and the accused.

45. To corroborate the version of informant PW2 Pawan Jaiswal, the prosecution has also examined PW1 Vikas Tidke, who acted as carrier and handed over the sealed articles to the Chemical Analyzer. The Chemical Analyzer's Report, the evidence of informant PW2 Pawan Jaiswal, the evidence of shadow pancha PW3 Uddhav Khobragade, and the evidence of pancha No.2 PW5 Dudharam Bhagat show that the amount was seized from the shirt pocket of the accused. There is no dispute that the amount was recovered from the shirt pocket of the accused. The Chemical Analyzer's Report is also showing and supporting the said fact.

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46. It is well settled that mere possession and recovery of currency notes from accused without proof of demand would not establish an offence under Section 7 as well as Section 13(1)(d)(i)(ii) of the said Act.

47. It is held by the Honourable Apex Court in paragraph Nos.13 and 14 in the case of **Mukhtiar Singh (since deceased) through his LR vs. State of Punjab** cited *supra* as follows:

“13. Before averting to the evidence, apt it would be to refer to the provisions of the Act whereunder the original accused had been charged:

“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

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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 three years but which may extent to seven years and shall also be liable to 2 (2014) 5 SCC 103 3 (2016) 11 SCC 357 fine.

13. Criminal misconduct by a public servant – (1) A public servant is said to commit the offence of criminal misconduct, (2).....”

14. The indispensability of the proof of demand and illegal gratification in establishing a charge under Sections 7 and 13 of the Act, has by now engaged the attention of this Court on umpteen occasions. In A.Subair vs. State of Kerala, this Court propounded that the prosecution in order to prove the charge under the above provisions has to establish by proper proof, the demand and acceptance of the illegal gratification and till that is accomplished, the accused should be considered to be innocent.”

48. In the present case, as noted above, the evidence as to the demand of illegal gratification is not satisfactory and convincing and since proof of demand is a *sine qua non* for convicting the accused in such cases, in the

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present case, it cannot be said the prosecution has been successful in proving its case beyond reasonable doubt.

49. After appreciating the evidence on record, it reveals that as per the prosecution case, the accused has demanded the amount for recommending of the Money Lending Licence. The evidence shows that the accused has given all requisite information to informant PW2 Pawan Jaiswal which requires to apply for the Money Lending Licence. Not only the same but also the accused informed him that he has to deposit the amount by challan in the State Bank of India, he has to obtain the consent letter of his wife, and he has to file an affidavit. The evidence further shows that the accused has also handed over the format of the affidavit to the informant. The evidence of the informant shows that on 26.7.1994 before the raid was conducted, he visited the office of the accused and the accused recorded his statement. Shadow pancha PW3 Uddhav Khobragade also stated during his cross examination that before accepting the amount, the accused has handed over some documents to the informant and

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obtained his signatures. This evidence shows that the accused has completed the formalities before fulfillment of the demand. The evidence of PW4 Sheshrao Deorao Nimbalkar, who is office bearer of the accused, also shows that the Money Lending Licence is to be issued by the Registrar of the Cooperative Societies. The accused has no power to issue the Money Lending Licence. Only application is to be submitted to the accused and the accused was required to look after the processing. If this evidence is taken into consideration, in the light of the admissions given by the informant and the shadow pancha, it sufficiently shows that the accused has processed the application of the informant.

50. In the case of **The State of Maharashtra vs. Ramrao Marotrao Khawale**¹⁶ this court has held that when a trap is set for proving the charge of corruption against a public servant, evidence about prior demand has its own importance. It is further held that the reason being that the complainant is also considered to be an interested witness

¹⁶ 2017 ALL MR (Cri) 3269

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or a witness who is very much interested to get his work done from a public servant at any cost and, therefore, whenever a public servant brings to the notice of such an interested witness certain official difficulties, the person interested in work may do something to tempt the public servant to bye-pass the rules by promising him some benefit. Since the proof of demand is *sine qua non* for convicting an accused, in such cases the prosecution has to prove charges against accused. Whereas, burden on accused is only to show probability and he is not required to prove facts beyond reasonable doubt.

51. The Honourable Apex Court in the case of **Mohmoodkhan Mahboobkhan Pathan vs. State of Maharashtra**¹⁷ held that the primary condition for acting on the legal presumption under Section 4(1) of the Act is that the prosecution should have proved that what the accused received was gratification. The word "gratification" is not defined in the Act. Hence it must be understood in its literal meaning. In the Oxford Advanced Learner's Dictionary of

¹⁷ (1997)10 SCC 600

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Current English, the work "gratification" is shown to have the meaning "to give pleasure or satisfaction to". The word "gratification" is used in Section 4(1) to denote acceptance of something to the pleasure or satisfaction of the recipient. If the money paid is not for personal satisfaction or pleasure of the recipient it is not gratification in the sense it is used in the section. In other words unless the prosecution proves that the money paid was not towards any lawful collection or legal remuneration the court cannot take recourse to the presumption of law contemplated in Section 4(1) of the Act, though the court is not precluded from drawing appropriate presumption of fact as envisaged in Section 114 of the Evidence Act at any stage.

52. In the case of **State of Maharashtra vs. Rashid B.Mulani**¹⁸ it is held that a fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless therefore, the explanation is supported by

¹⁸ (2006)1 SCC 407

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proof, the presumption created by the provision cannot be said to be rebutted. Something more, than raising a reasonable probability, is required for rebutting a presumption of law. Though, it is well-settled that the accused is not required to establish his explanation by the strict standard of 'proof beyond reasonable doubt', and the presumption under Section 4 of the Act would stand rebutted if the explanation or defence offered and proved by the accused is reasonable and probable.

53. In the instant case, upon careful consideration of the prosecution evidence, particularly the evidence of informant PW2 Pawan Jaiswal as well as shadow pancha PW3 Uddhav Khobragade, I find that the prosecution could not establish beyond reasonable doubt the prior demand that gratification was demanded by the accused. The evidence of informant and the shadow pancha is not corroborative on material particulars which requires to corroborate in view of the decision of the Honourable Apex Court in the case of **Panalal Damodar Rathi vs. State of Maharashtra** cited *supra* . The earlier demand as per the

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prosecution was in presence of independent witness Sujit Bagde who is not examined by the prosecution. The material evidence shows that prior to fulfillment of the demand, the accused has acted upon the application filed by the informant and complied the requirements. The only duty assigned to the accused was to process the application. To process the application, the accused has not only furnished necessary information to the informant but also prepared his documents, obtained his signatures, and recorded his statement.

54. It is well settled that while deciding the offence under said Act, complainant's evidence is to be scrutinized meticulously. There could be no doubt that the evidence of complainant should be corroborated in material particulars. The complainant cannot be placed on any better footings than that of an accomplice and corroboration in material particulars connecting the accused with the crime has to be insisted upon.

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55. As far as the applicability of presumption is concerned, learned Additional Public Prosecutor for the State placed reliance on the decision of the constitution bench of the Honourable Apex Court in the case of **Neeraj Dutta vs. State (Govt.of NCT of Delhi)** cited *surpa* wherein it has been held that presumption of fact with regard to the demand and acceptance or obtainment of an illegal gratification may be made by a court of law by way of an inference only when the foundational facts have been proved by relevant oral and documentary evidence and not in the absence thereof. On the basis of the material on record, the Court has the discretion to raise a presumption of fact while considering whether the fact of demand has been proved by the prosecution or not. Of course, a presumption of fact is subject to rebuttal by the accused and in the absence of rebuttal presumption stands. It is further held that insofar as Section 7 of the Act is concerned, on the proof of the facts in issue, Section 20 mandates the court to raise a presumption that the illegal gratification was for the purpose of a

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motive or reward as mentioned in the said Section. The said presumption has to be raised by the court as a legal presumption or a presumption in law.

56. In the instant case, as observed earlier, that prior demand by the accused is not proved by the prosecution, a doubt is created as to the demand of the amount as the independent witness is not examined and there is no consistency between the evidence of informant PW2 Pawan Jaiswal and the and the accused. I have already observed that the principles for according the sanctions are also not taken into consideration.

57. As it has been already observed that it is well settled that granting of sanction is a solemn sacrosanct act which affords protection to the government servants against frivolous prosecutions, there is an obligation on the sanctioning authority to discharge its duty to give or withhold sanction only after having full knowledge of the material facts of the case. The sanctioning authority to

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exercise powers strictly keeping in mind all relevant facts and material and accord the sanctions.

58. Here in the present case, sanction order Exhibit-45 discloses that the material was examined by the Government of Maharashtra and the satisfaction for according of sanction was also arrived at by the Government of Maharashtra. The sanction order does not specifically mention name of any officer who had actually undertaken the exercise of examining the material and recording a subjective satisfaction in this regard on behalf of the Government of Maharashtra.

59. Thus, the entire exercise carried out, as far as sanction is concerned, is in secrecy and it is not known as to who has applied his mind and accorded the sanction. A sanction order showing *prima facie* application of mind is a valid sanction.

60. Thus, on the ground of sanction also the prosecution in the present case fails. The evidence as to the demand is not satisfactory and proof of demand is

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sine qua non to prove the charge. As such, as the appeal deserves to be allowed, I pass following order:

ORDER

(1) The criminal appeal is **allowed**.

(2) The judgment and order of conviction and sentence dated 28.2.2005 passed by learned Judge, Special Court, designated under The Prevention of Corruption Act, 1988 (learned Judge of the trial court), Nagpur in Special Case No.5/1996 convicting and sentencing the accused is hereby quashed and set aside.

(3) The accused is acquitted of offences for which he was charged.

The appeal stands **disposed** of.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!

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