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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.03.2023	Pronounced on : 20.03.2023

CORAM:

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

Criminal Appeal No.73 of 2016

D.Thangavelu. ... Appellant/Accused

/versus/

State rep. by,
Inspector of Police,
Vigilance & Anti Corruption,
Chennai. ... Respondent/Complainant

Prayer: Criminal Appeal has been filed under Section 374 of Cr.P.C., pleased to allow this Criminal Appeal, set aside the judgment dated 11.01.2016 passed by the Hon'ble Special Judge/Chief Judicial Magistrate, Thiruvallur, in Spl.Case No.13 of 2010, pass such other orders.

For Appellant : Mr.R.John Sathyan, Senior Counsel, for Mr.A.Sasikumar.

For Respondent : Mr.S.Udaya Kumar, Government Advocate (Crl.Side).

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JUDGMENT

The appellant herein is the accused in Special Case No.13 of 2010, on the file of Special Judge, Chief Judicial Magistrate Court at Thiruvallur. The accused was tried for the offences under Section 7 and 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988. The Learned Trial Judge, on appreciating the testimony of 10 witnesses, 12 documents and 7 material objects found the appellant guilty and sentenced him to undergo one year rigorous imprisonment and with fine of Rs.10,000/-, in default, simple imprisonment for three months for offence under Section 7 of Prevention of Corruption Act, 1988. Sentenced him to undergo two years R.I and fine of Rs.10,000/-, in default three months simple imprisonment for offence under Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act. The period of sentence ordered to be run concurrently. The period of imprisonment already undergone ordered to be set off.

2. The case of the prosecution as spoken through its witnesses is capsulized below:-

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One Mr.Vijayakumar, working as a Planning Engineer in a construction Company by name M/s.Kreta Construction Private Limited submitted application for transfer of Patta, on behalf of M.O.S Ameer and S.H.Aiysha, who are relatives of his Company Director Mr.K.Ameer. The said application dated 07/07/2008 was not considered for a month therefore, he went to the Taluk Office at Ambattur and enquired. He was instructed to meet the accused, who was serving as Firka Surveyor at Ambattur Taluk Office at that point of time. After, he met the accused and enquired, the application was processed. Again, on 18/11/2008, at 14.00 hrs when Vijayakumar met the accused and asked for patta copy, the accused demanded Rs.25,000/- as gratification. After negotiation, the accused agreed to receive bribe in instalment, viz., Rs.10,000/- as advance and balance to be paid on receipt of the patta. He asked Vijayakumar to meet him on 24/11/2008 with money.

3. When Vijayakumar informed his Managing Director, Mr.Ameer and the applicants about the demand of bribe by the accused, they decided not to give bribe to the accused but to report the matter to the Vigilance Department. Accordingly, Vijayakumar gave a complaint on 24/11/2008 to the

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Deputy Superintendent of Police, DV&AC, at Nandanam. Case in Crime No.5/AC/2008/CC-III was registered by the Inspector of Police, Mr.Venkatesan as directed by the DSP. Trap was organised in the presence of two official witnesses by the Inspector of Police Mr.Venkatesan. After demonstrating the significance of phenolphthalein-sodium carbonate test to the witnesses, he entrusted the phenolphthalein smeared currency to the complainant. The numbers of those currency recorded in the entrustment mahazar. He took his team to the Office of the accused and reached at about 15.30 hours on 24/11/2008. The complainant Vijayakumar and one of the shadow witness Jaya Kumar met the accused at Ambattur. As requested by the accused, they accompanied him to his Office-cum-residence at Vanagaram in an auto rickshaw. The other members of the trap team followed them. At his Office-cum-residence in Vanagaram the accused demanded money and obtained the phenolphthalein smeared currency (Rs.1000 x 1; Rs.500 x 14 and Rs.100 x 10) sum of Rs.10,000/- from the complainant Vijayakumar. Thereafter, the complainant and the shadow witness came out and gave the prearranged signal to the trap team by changing the wrist watch from one hand to another. Thereafter, the Inspector, Venkatesan entered the Office-cum-residence of the

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accused and introduced himself and prepared sodium carbonate solution and asked the accused to dip his fingers in the colourless sodium carbonate solution. When he dipped his hand, the colour of the solution turned into light red. The colour wash solution for each hand was collected in separate bottles. On enquiry, the accused admitted to the Inspector of Police that, he received money from Vijaya Kumar and handed over the money to him. Then accused was provided with an alternate shirt and the pocket portion of the shirt where money was kept by the accused was dipped in the colourless sodium carbonate solution which turned into light red. The solution was collected in a bottle. Thereafter, the files relating to the Patta transfer application was recovered from the accused. The accused was arrested and same was informed to the Head Surveyor Mr.Jayachandran. He came to Vanagaram, witnessed the seizure process and signed the Seizure mahazar. Meanwhile, the residence of the accused at Kanchipuram was also searched but no incriminating material was recovered. On completion of investigation, the final report was laid by Tmt.Arulselvam, the Inspector of Police.

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4. The evidence placed before the trial Court:

P.W-1 is the Officer competent to remove the accused from service, the sanction to prosecute issued by him is marked as Ex.P-1. The complainant Vijayakumar died before the commencement of the trial. P.W-5 Mr.Ameeer Ahamed, the Managing Director of the Company, in which, Vijayakumar was working as a Planning Engineer was examined to speak about the complaint Ex.P-2 and to identify the signature of the complainant. P.W-2 Mr. Jayakumar, is one of the shadow witnesses. He has deposed about the entrustment mahazar (Ex.P-3) prepared prior to the trap. The recovery of M.O.1 to M.O.3 currency under the seizure mahazar Ex.P.4 and the demand and acceptance of money by the accused on the day of trap. P.W-3 Mr.G.Jayachandran, the Chief Surveyor, who witnessed the drawing of seizure mahazar, at the Office-cum-residence of the accused at Vanagaram had deposed about Ex.P.4. Mr.Gangadharan (P.W-4) conducted search of the accused residence at Kanchipuram. No incriminating material collected during the said search. P.W-6 Mr.Dhanasekaran, the Taluk Surveyor had deposed that, he is the immediate superior to the accused. A week before the trap, regarding the land which was sought for patta name transfer, the accused had a doubt since it is adjacent to Government Land hence

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requested him to come and measure it. At his request, he went along with the accused and measured the land. P.W-8 Smt.Karpagam is the Scientific Officer attached to the State Forensic Laboratory, who has tested the solutions in bottled marked as M.O.4 to M.O.6, sent for chemical analysis, had given her report marked as Ex.P-8 with her opinion that, both phenolphthalein and sodium carbonate were detected in all the three items. P.W.9, Venkatesan is the Inspector of Police, who registered the F.I.R (Ex.P.9) laid the trap. He has deposed about the receipt of the complaint Ex.P.2 from Vijayakumar, entrustment mahazar (Ex.P.3), Seizure Mahazar Ex.P.4. On completion of investigation, P.W-10, Tr.Arulselvam, is the Inspector of Police, who laid the final report.

5. The accused challenges the finding of the Trial Court on the following reasons:-

The Learned Senior Counsel appearing for the appellant submit that G.Vijaya Kumar, who is the prime witness for demand and acceptance and being the defacto complainant and set the law into motion, passed away before

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the trial commenced. The remaining witness for the prosecution regarding acceptance of the alleged bribe money is P.W.2 Mr.S.Jayakumar. He has not stated anything in his evidence about the demand of money by the appellant/accused. According to prosecution, G.Vijaya Kumar (defacto complainant) and S.Jayakumar (P.W.2), first went to the Office of the accused at Ambattur and thereafter, they left the Office and went to Vanagaram, where the accused alleged to have been had his Office-cum-residence. The trap proceedings at Vanagaram is between 16.30 hrs to 18 hrs.

6. It is contended that, at 16.15 hrs, G.Vijaya Kumar (defacto complainant) and S.Jayakumar (P.W.2) went inside the Office-cum-residence of the accused at 16.15 hrs and came out at 16.25 hrs and gave the pre-arranged signal. P.W.2 (S.Jayakumar), had not said what happened at the appellant's Office-cum-residence between 16.15 hrs to 16.25 hrs, except Jayakumar enquiry about patta transfer and the accused demanded Rs.10,000/-. Soon after, G.Vijaya Kumar gave the money to the accused. The accused received it and kept in his shirt pocket. Then G.Vijaya Kumar gave the pre-trap signal. This conversation and transaction would have hardly taken few minutes but there is

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no explanation for them to stay with the appellant for 10 minutes. Further, P.W.2 (S.Jayakumar) could not furnish any particulars about the auto in which, he, the accused (Thangavelu) and Vijaya Kumar, alleged to have went to Vanagaram from Ambattur.

7. The record indicates that, the accused measured the land a week before the trap and report was ready and the appellant is not the Patta issuing authority. The prosecution has to fail since the allegation that the accused demanded bribe from him on 18.11.2008 gets falsified in view of the fact that measured the land and draft patta already made ready prior to the alleged demand.

8. The testimony of P.W.5 (Ameer) is not admissible since what all he deposed is only a hearsay through Vijayakumar. As far as the alleged demand of bribe on 24.11.2008 on the day of trap, the case of the prosecution bristles with contradictions and inconsistence. P.W.2 (S.Jayakumar), the decoy witness been an Official witness. There should have been a formal request from the Vigilance Department to the Head of the Department to depute staff to

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stand as decoy witness and the said communication ought to have been produced before the trial Court. In this case, in the absence of such communication, the very presence of the shadow witness, who is the Government Official, renders the prosecution case doubtful.

9. The trial Court failed to considered that, P.W.2 (Jayakumar), could not re-collect the elementary details, such as, who applied the phenolphthalein powder on the currency at the time of entrustment, who counted the currency before entrustment, the registration number of the auto in which they went to reach the Office of the accused etc., thus makes his presence at the place of trap doubtful. Thus, P.W.2 (S.Jayakumar), is wholly unreliable witness since he could not narrate about the entrustment or the subsequent recovery of tainted money from the accused without contradiction to the documentary evidence.

10. Further, the Learned Senior Counsel appearing for the appellant would submitted that the very fundamental of the prosecution case is shaky since it has not established how Vijayakumar is interested in getting patta transfer for the property claimed by M.O.S.Ahmeer and S.H.Aiysha. The

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prosecution has not even placed document or proof that, P.W.5 (Ameer Ahmed) is related to the owner of the property for which patta transfer sought. Also, they have not placed any evidence to show Vijayakumar and Ameer Ahmed (P.W.5) had employer-employee relationship. The accused, who is a Firka Surveyor is not person competent to decide transfer of name in the patta. P.W.6 (Dhanasekaran), the Taluk Surveyor had clearly deposed that the survey number for which name transfer sought surrounded by Government land and therefore, the accused requested (P.W.6) Taluk Surveyor to visit the field and measure it. Soon after, the survey and measurement was done, the accused has recommended for change of patta, in fact, on the day of trap, name transfer in the patta was carried out and copy given to the defacto complainant. Therefore, the conviction and sentence imposed by the trial Court has to be set aside.

11. The case of the prosecution as spoken through P.W.2 is that, on 24.11.2008, S.Jayakumar, who is the shadow witness. He was asked by his superior orally to go to the Vigilance Office and he along with one Balaji went to the Vigilance Office as per the instruction of his Senior Officer. He had deposed that, it was an oral instruction to him and his colleague Balaji. P.W.2

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(S.Jayakumar), was working as Assistant Superintendent in Pay and Accounts Office. He being a respectable person, there is no reason to doubt his credibility. He has deposed about his presence at the time of preparing the entrustment mahazar and the trap proceedings held on 24.11.2008. He was examined on 12.06.2012, four years after the incident. He was unable to re-collect certain minute details regarding the persons who smeared the phenolphthalein powder on the currency and the person who counted the currency before entrustment. The lack of memory regarding these details and failure to recollect after lapse of 4 years is natural and it cannot render his testimony unreliable. P.W.2 has deposed that, on the day of trap, he, along with Vijayakumar and the trap team went to the Ambattur Taluk Office. He and Vijayakumar alone entered the Office and other members of the trap team were standing outside, waiting for the prearranged signal. Since the accused asked them to accompany him to his Office-cum-residence at Vanagaram, he along with the accused and Vijayakumar has went in an Auto to Vanagaram where the accused had his Office-cum-residence. When he entered the Office-cum-residence of the accused, Vijayakumar has enquired about the patta transfer application. The accused in turn has demanded Rs.10,000/- thereafter,

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Vijayakumar has handed over the phenolphthalein smeared currency of Rs.10,000/-. The accused has received it in his right hand and kept it in his left side shirt pocket. The failure to recollect the auto registration number cannot be a reason to reject the evidence of P.W.2 and the other witnesses and to hold the accused was in his Office at Ambattur never left the Ambattur or the trap did not occur at his Office-cum-residence at Venagaram because P.W.3, K.G.Jayachandran, the Taluk Surveyor, who is the superior to the accused had deposed that, on 24.11.2008, at about 5.00 p.m in the evening, Inspector of Police attached to Vigilance Cell called him over phone from Vanagaram and informed about the arrest of the accused and called him to Vanagaram. After intimating, the Tahslidar about the information he received from the Inspector, he proceeded to Vanagaram and reached the Office-cum-residence of the Firka Surveyor Thangavelu, the accused at about 5.30 p.m. He has also stated that the accused had set up a private Office at Venagaram since he had heavy work load and when he went to the Office-cum-residence of the accused at Venagaram, he saw the Inspector of Police, Vijayakumar and two official witnesses, whose name he could not re-collect. Therefore, when the fact that the accused caught in the trap at his Office-cum-residence in Vanagaram, not

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only been spoken by the police and P.W.2 the shadow witness but the witness from his own Department P.W.3 (K.G.Jayachandran), who is the Superior of the accused had corroborated the version of the prosecution regarding the place of trap. The earlier demand of bribe Rs.25,000/- as found in the complaint of Vijayakumar could not be proved since Vijayakumar died before the commencement of the trial. This will not be fatal to the case of the prosecution since the prosecution has proved the subsequent demand through other direct witness namely P.W.2.

12. In the decision of the Hon'ble Supreme Court consisting of Five Judges in ***Neeraj Dutta -vs- State (Govt. of N.C.T. of Delhi),*** reported in ***2022 SCC OnLine 1724***, it has been clearly held that the death of the defacto complainant or, he turning hostile, need not necessarily be fatal to the prosecution in the cases registered under Sections 7 and 13(1)(d) of Prevention of Corruption Act, 1988.

13. The Constitutional Bench of the Hon'ble Supreme Court referred the question for consideration and answered as under:

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> *"In the absence of evidence of the complainant (direct/primary, oral/documentary evidence) it is permissible to draw an inferential deduction of culpability/guilt of a public servant under Section 7 and Section 13(1)(d) read with Section 13(2) of the Act based on other evidence adduced by the prosecution."*

14. In the instant case, P.W.2 has heard the demand and seen the accused receiving the money of Rs.10,000/- from Vijayakumar, his evidence stands unimpeached in spite of certain doubts by way of suggestion put to him. P.W.3 the Superior Officer of the accused, reached the trap spot soon after the arrest of the accused and he has spoken about what he saw at Venagaram in the Office-cum-residence of the accused. He has also signed the seizure mahazar Ex.P.4 to prove his presence.

15. The fundamental fact that there was an application for change of patta and that was pending for more than a month in the Taluk Office is proved through Ex.P.5 which contains the application for issuance of patta given by M.O.S.Ameer and S.H.Aiysha along with challan for Rs.80/-, dated 07.07.2008. Pursuant to this application, enquiry has been conducted and the accused has

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made recommendation for issuance of patta and he has duly signed. The fact that, patta was not issued till the date of complaint is also proved. The seizure mahazar (Ex.P.4) not only indicate that the currency of Rs.10,000/- smeared with phenolphthalein recovery from the accused but also the file containing the documents related to the application for name transfer were also recovered. P.W.3 (K.G.Jayachandran), the Head Surveyor, attested in the documents and handed it over to the Investigating Officer for further investigation. Since the prosecution has proved the necessary fundamental facts regarding demand of illegal gratification and acceptance of the same, the presumption under Section 20 of Prevention of Corruption Act, 1988, can be drawn by relying the Constitution Bench judgment rendered in ***Neeraj Dutta -vs-State (Govt. of N.C.T of Delhi)*** reported in ***2022 SCC Online SC 1724***, which summarises the factors be considered for drawing presumption under Section 20 of Prevention of Corruption Act, 1988. For the sake of convenience, the relevant portion is extracted below:

> *"(a) Proof of demand and acceptance of illegal gratification by a public servant as a fact in issue by the prosecution is a sine qua non in order to establish the guilt of the accused public servant under Sections 7 and*

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13(1)(d)(i) and(ii) of the Act.

(b) In order to bring home the guilt of the accused, the prosecution has to first prove the demand of illegal gratification and the subsequent acceptance as a matter of fact. This fact in issue can be proved either by direct evidence which can be in the nature of oral evidence or documentary evidence.

(c) Further, the fact in issue, namely, the proof of demand and acceptance of illegal gratification can also be proved by circumstantial evidence in the absence of direct oral and documentary evidence.

(d) In order to prove the fact in issue, namely, the demand and acceptance of illegal gratification by the public servant, the following aspects have to be borne in mind:

> *(i) if there is an* ***offer to pay by the bribe giver*** *without there being any demand from the public servant and the latter simply accepts the offer and receives the illegal gratification, it is a* ***case of acceptance*** *as per Section 7 of the Act. In such a case,*

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there need not be a prior demand by the public servant.

*(ii) On the other hand, **if the public servant makes a demand** and the bribe giver accepts the demand and tenders the demanded gratification which in turn is received by the public servant, it is **a case of obtainment**. In the case of obtainment, the prior demand for illegal gratification emanates from the public servant. This is an offence under Section 13(1)(d)(i) and (ii) of the Act.*

(iii) In both cases of (i) and (ii) above, the offer by the bribe giver and the demand by the public servant respectively have to be proved by the prosecution as a fact in issue. In other words, mere acceptance or receipt of an illegal gratification without anything more would not make it an offence under Section 7 or Section 13(1)(d), (i) and (ii) respectively of the Act. Therefore, under Section 7 of the Act, in order to bring home the offence, there must be an offer which emanates from the bribe giver which is accepted by the public servant which would make it an offence. Similarly, a prior demand by the public servant when accepted

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by the bribe giver and inturn there is a payment made which is received by the public servant, would be an offence of obtainment under Section 13(1)(d) and (i) and (ii) of the Act.

(e) The 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.

(f) In the event the complainant turns 'hostile', or has died or is unavailable to let in his evidence during trial, demand of illegal gratification can be proved by letting in the evidence of any other witness who can again let in evidence, either orally or by documentary evidence or the prosecution can prove the case by circumstantial evidence. The trial does not abate nor does it result in an order of acquittal of the accused public servant.

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(g) In so far 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 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. Of course, the said presumption is also subject to rebuttal. Section 20 does not apply to Section 13(1)(d)(i) and (ii) of the Act.

(h) We clarify that the presumption in law under Section 20 of the Act is distinct from presumption of fact referred to above in point (e) as the former is a mandatory presumption while the latter is discretionary in nature."

16. In the instant case, though the complainant (Vijayakumar) expired before commencement of the trial, the fact of demanding bribe been proved by the prosecution through P.W.2 (S.Jayakumar), the shadow witness and obtainment of illegal gratification also been spoken by P.W.2 and proved through the recovery of the marked currency from the possession of the accused. The number found in those currency which are recovered from the accused tallies with the numbers noted in the entrustment mahazar, indicating

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that the money which was entrusted to Vijayakumar under the entrustment seizure mahazar Ex.P.3 in the Vigilance Office, Nandanam at about 11.30 a.m, in the morning on 24.11.2008 been found in possession of the accused at about 4.30 p.m in the evening at his Vanagaram Office-cum-residence. The accused had not given any plausible explanation for the possession of the marked currency. The phenolphthalein-sodium carbonate test in addition corroborates the case of the prosecution about the obtainment of money from Vijayakumar by the accused. In the absence of explanation for obtaiment of money for any legal purpose, the presumption to be drawn is that, it was obtained as an illegal gratification in connection with discharge of the Official duty. The defence of the accused that, he has anything to do with the issuance of patta is false and fake defence. The proved facts indicates he had a role in the of issuing patta process. He had sought the help of P.W.4 (S.Gangadharan), to survey the land and he been a Firka Surveyor had given a report recommending the Tashildar to issue patta.

17. For the reason stated above, this Court holds that the judgment

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passed by the trial Court need to be confirmed since the grounds raised in the appeal not sustainable. Hence, ***Criminal Appeal is dismissed.*** The trial Court shall take steps to secure the accused/appellant and commit him to prison to undergo the remaining period of sentence. The period of sentence already undergone shall be set off under Section 428 of Cr.P.C. Bail granted stands cancelled.

20.03.2023

Index :Yes.
Internet :Yes.
Neutral Citation : Yes/No.
Speaking order/Non-speaking order
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To,
1. The Special Judge/Chief Judicial Magistrate, Thiruvallur.
2. The Inspector of Police, Vigilance & Anti Corruption, Chennai.
3. The Public Prosecutor, High Court, Madras.

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Dr.G.JAYACHANDRAN, J

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Pre-Delivery judgment made in
Criminal Appeal No.73 of 2016

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