2024:BHC-NAG:5380

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

CRIMINAL APPEAL NO. 428 OF 2005

Ramesh S/o Lachmanayya Donkalwar,
Aged about 36 years,
R/o. Ramtek, District Nagpur.

.... **APPELLANT**

// **VERSUS** //

The State of Maharashtra,
Through Anti-Corruption Bureay,
District Nagpur.

.... **RESPONDENT**

Mr. Ved Deshpande, Advocate for Appellant.
Mr. U.R. Phasate, Additional Public Prosecutor for Respondent.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 01.04.2024.
PRONOUNCED ON : 07.05.2024.

JUDGMENT.

1. By this appeal, the appellant (accused) has challenged the judgment and order of conviction and sentence dated 27.07.2005 passed by learned Judge, Special Court, designated under The Prevention of Corruption Act, 1988 (learned Judge of the trial court), Nagpur in Special Case (ACB) No.15/1998. By the said judgment,

the accused is convicted for the offences punishable under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (for short, "the said Act") and sentenced to suffer simple imprisonment for three years and to pay fine of Rs.1,000/-, in default to suffer simple imprisonment for a period of six months.

2. The brief facts of the prosecution's case runs as under :

(i) In August-1997, accused Nos.1 and 2 were attached to Police Station, Ramtek and on 06.08.1997, they both were deputed on duty at Police Help Center, Mansar. The Deputy Superintendent of Police (Dy.S.P.) Mr. Hiware received a discreet information that the police staff on duty at Police Help Center were recovering entry fee from the vehicles passing from Police Help Center. After receiving discreet information, the Dy.S.P. Mr. Hiware decided to lay a trap. Accordingly, he called two panchas. Along with the panchas ACB staff left ACB office and went at Somalwada. Dy.S.P. Mr. Hiware along with the panchas and ACB staff hired Swaraj Mazda mini truck to go to Mansar. They proceeded along with the articles like Phenolphthalein powder bottle, sealed container Sodium Carbonate, four bottles, one big size bottle, measuring tape, vax material etc. After reaching at Mansar, he received further information that three boys are engaged by Police Help Center, who used to stop vehicles and collecting entry fee on direction of the constables. They verified said information by passing through Mansar road and found that vehicle was stopped by three boys showing torch and their vehicle was also stopped. At the said Center, they saw the police constable sitting in the tent. Their vehicle was checked by the said three boys. Accordingly, they have taken their mini truck on Paoni road. Accordingly, they have drawn the panchnama. Before drawing the panchnama, the trap Officer shown demonstration as to the characteristic of Phenolphthalein powder and Sodiam Carbonate and also instructed the panchas. The trap Officer had applied the said Phenolphthalein powder and Sodiam Carbonate solution on a tainted note of Rs.50/-. For the trap, they have taken the help of one truck driver. The truck driver was also instructed that if he was asked to produce the documents, he should not object and shall give a proper reply. Thereafter, the trap Officer sat along with the driver in said truck. Accordingly, Pre-trap Panchnama was drawn.

(ii) After Pre-trap Panchnama, the trap Officer, panchas along with the truck driver and the mini truck proceeded from Paoni towards Manasar. At the Police Help Center, the truck was stopped. The driver Ramlochan Yadav of the truck handed over the tainted note of Rs.50/- to the cleaner. The panch No.1 went along with cleaner and approached to the accused persons who were sitting in the tent. He handed over the said amount to the accused No.1 thereafter, panch No.1 gave a signal and immediately the accused No.1 was caught and the tainted note was recovered from him. Both the accused are arrested. Accordingly, Post-trap Panchnama was also drawn. The amount was seized and after completion of the formality, the trap Officer has lodged a report against both the accused. After obtaining the due sanction, the charge-sheet was filed.

3. To substantiate the allegations, the prosecution has examined in all eight witnesses that are : P.W.-1 Smt. Rashmi Shukla/ Sanctioning Authority Exhibit-17, P.W.-2 Vasant Namdeorao Bedarkar/panch No.1 Exhibit-22, P.W.-3 Nandkishor Nilkant Borde/panch No.2 Exhibit-30, P.W.-4 Prakash Lalasing Pawar/Dy.S.P. Exhibit-31, P.W.-5 Meghnath Dipsingh Damniya/Police Head Constable Exhibit-32, P.W.-6 Dilip Hiralal Tiwari/Police Nayak Exhibit-34, P.W.-7 Vinayak Sitaramji Hiwre/Trap Officer Exhibit-37 and P.W.-8 Prashant Prabhakar Kolwatkar Exhibit-51.

4. Besides the oral evidence, the prosecution further relied upon Sanction Order Exhibit-19, Seizure Memos Exhibit Nos.23 to 26, Post-trap Panchnama Exhibit-27, Pre-trap Panchnama Exhibit-29,

First Information Report Exhibit-33, Report Exhibit-39, Letter to C.A. Exhibit-41 and C.A. Report Exhibit-45.

5. After considering the evidence adduced during the trial, learned Judge of the trial Court held the accused No.1 guilty of the offence punishable under Section 13(1)(d) read with Section 13(2) of the said Act and convicted and sentenced him as the aforesaid.

6. I have heard learned Counsel Mr. Ved Deshpande for the appellant and Mr. Phasate learned Assistant Public Prosecutor 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.

7. The learned Counsel Mr. Ved Deshpande for the appellant submitted that the learned Judge of the trial Court erred in convicting the accused in absence of any cogent and reliable evidence as the demand and acceptance of the alleged illegal gratification of Rs.50/- is not proved. It is submitted that mere possession and recovery of currency note from the accused No.1 without proof of demand will not bring home the offence under Section 13(1)(d) of the said Act. It is submitted that demand and acceptance of illegal

gratification is a *sine qua non* to attract provisions. The burden to prove accusations with regard to the acceptance of illegal gratification lies on the prosecution. As far as the evidence of the complainant and panch are concerned, which is insufficient to prove that there was a demand and in pursuance of the demand, the amount was accepted. He further submitted that the evidence shows that the accused has returned Rs.30/- when the currency of Rs.50/- was given to him. The sanction accorded is also not a valid sanction and it is without application of mind. Thus, for want of valid sanction also, the case of the prosecution fails and he prays for acquittal of the accused.

8. In support of his contentions, learned counsel for the accused placed reliance on following decisions :-

(1) ***Mahadeo S/o Sadashiv Kanoje Vs. State of Maharashtra***, ***Criminal Appeal No.136/2006***, decided on 06.03.2024;

(2) ***Khaleel Ahmed Vs. State of Karnataka***, reported in ***(2015) 16 SCC 350***;

(3) ***C.M. Girish Babu Vs. CBI, Cochin, High Court of Kerala,*** reported in ***(2009) 3 SCC 779,***

(4) ***State of Maharashtra Vs. Dnyaneshwar Laxman Rao Wankhede***, reported in ***(2009) 15 SCC 200***;

(5) ***State of Punjab Vs. Madan Mohan Lal Verma***, reported in ***(2013) 14 SCC 153***;

(6) ***Mukhtiar Singh (Since Deceased) Through his Legal Representative Vs. State of Punjab***, reported in ***(2017) 8 SCC 136***;

(7) ***Onkar Tukaram Ramteke Vs. The State of Maharashtra***, ***Criminal Appeal No.357/2012,*** decided on 17.03.2022,

(8) ***Mohan Bhaiyyalal Shrivastava Vs. The State of Maharashtra***, ***Criminal Appeal No.265/2005,*** decided on 04.09.2023;

(9) ***N.P. Lotlikar Vs. C.B.J. and another***, reported in ***1992 SCC OnLine Bom 438*** and

(10) ***Banarsi Dass Vs. State of Haryana***, reported in ***(2010) 4 SCC 450***.

9. Per contra, learned Additional Public Prosecutor for the State submitted that the evidence of complainant, who is the trap Officer, is corroborated by a shadow panch as well as panch No.2. He submitted that a decoy was sent to ascertain and verify the fact of demand of the money, the accused has accepted the amount. The amount was recovered from the accused and no plausible explanation is put forth by the accused. The prosecution has also proved that the

sanction is as per law and, therefore, no interference is called for in the impugned judgment.

10. In support of his contention, the learned APP placed reliance on following decisions :-

(1) ***Hazari Lal Vs. State (Delhi Administration)***, reported in ***(1980) 2 SCC 390***;

(2) ***State of A.P. Vs. P. Satyanarayana Murthy***, reported in ***2009 ALL MR (Cri) 1264*** and

(3) ***Neeraj Dutta Vs. State (Government of NCT of Delhi)***, reported in ***(2023) 4 SCC 731***.

11. 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.

12. In order to prove the sanction order, the prosecution placed reliance on the evidence of P.W.-1, who is the Sanctioning Authority namely Smt. Rashmi Shukla. The sum and substance of her evidence is that in 1998 she was working as Superintendent of Police Nagpur Rural. The powers of appointment and removal are vested

with Superintendent of Police. She received the case papers from ACB about the trap at Mansar. She also received the bunch of documents along with the list. She examined the case papers and accorded the sanction for prosecution of the accused. The said sanction order is at Exhibit-19. During her cross-examination, it came on record that accused No.1 – Ramesh Donkalwar was not posted at the place of trap, but the duty was allotted to him as a P.S.O. at Police Aid Centre, Mansar. She specifically admitted that sanction order was not personally drafted by her, its draft was received from ACB Office. She further admitted that she has not made any modification or alteration in the draft sent by the ACB at the time of giving sanction. She further admitted that she has not enquired from the ACB who are those three boys who are shown as witnesses and not as criminals. It is further came in her cross-examination that the alleged bribe amount was Rs.20/- as the amount of Rs.30/- was returned by accused. Thus, the cross-examination shows that she has not prepared the said sanction order, but she has accorded the sanction on the basis of draft sanction order. It further reveals from her evidence that she has not mentioned on the basis of which document she comes to the conclusion that the sanction is to be accorded. On perusal of the sanction order, it also reveals that she has reproduced the entire prosecution story and not referred any document on the basis of which she come to the conclusion that sanction is to be accorded.

13. Whether sanction is valid or not and when sanction can be called as valid, the same is settled by the various decisions of the Honourable Apex Court as well as this court.

14. The Honourable Apex in the case of ***Mohd.Iqbal Ahmad vs. State of Andhra Pradesh***, reported in ***1979 AIR 677***, 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.

15. The Honourable Apex Court, in another decision, in the case of ***CBI vs. Ashok Kumar Agrawal***, reported in ***2014 Cri.L.J. 930***, has held that sanction lifts the bar for prosecution and, therefore, it is

not 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 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.

16. The absence of description of documents referred by Sanctioning Authority P.W.-1 Rashmi Shukla would show the lack of application of mind by the competent authority while according the sanction.

17. In view of settled principles of law, it is crystal clear that Sanctioning Authority has to apply his/her own independent mind for generation of his/her satisfaction for sanction and 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, 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. Thus, the application of mind on the part of the Sanctioning Authority is imperative. It is true that the sanction order should not be an order like court orders, but it should reflect application of mind.

18. Perusal of sanction order shows that Sanctioning Authority P.W.-1 Rashmi Shukla reproduced the prosecution case and accorded the sanction. She specifically admits that she has not drafted the sanction order, but she has received the draft from the ACB Office and without any modification, she has accorded the sanction. Thus, it reveals that the Sanctioning Authority has not accorded the sanction by applying her own mind.

19. Besides the issue of sanction, the prosecution claimed that the accused accepted the gratification amount.

20. In order to prove the 'acceptance', the prosecution mainly placed reliance on the evidence of P.W.-2 Vasant Bedarkar, who acted as a panch for the trap. As per his evidence, his office received a communication from ACB Office, Nagpur, he and one Nandu Burde were deputed to act as a panch. They met the trap Officer Mr. Hiware, who had taken them at Somalwada. Thereafter, trap Officer has hired one matador, they sat in the matador and gone to Mansar. After reaching at Mansar, two-three persons have checked their matador and thereafter, they went at Paoni. ACB Officers stopped one truck driver and thereafter, ACB Officer Mr. Hiware sat in the cabin of said truck. Other persons who were in the matador, one of

them has applied the solution on the currency note of Rs.50/-. The said note was handed over to ACB Officer Mr. Hiware and he handed over the same to the truck driver. The truck driver kept the same in the chest pocket of his shirt. Thereafter, they went at Mansar Police chowky. The truck driver had given note to the cleaner. He went along with the cleaner at Police Help Center. Accordingly, the cleaner has handed over the note of Rs.50/- to the person sitting at said Police Help Center and said person has returned the amount of Rs.30/- to the cleaner. Thereafter, he gave a signal as instructed by the ACB Officer and the accused was caught from whom the amount was recovered. Accordingly, the Pre-trap panchnama and Post-trap panchnama are drawn. During his cross-examination it came on record that the amount was paid by the cleaner to the person. As far as the demand is concerned, there is no whisper by the said panch witness. On the contrary, his evidence shows that after handing over the amount of Rs.50/-, the accused No.1 has returned Rs.30/- back to the cleaner. Thus, as far as the demand is concerned, P.W.-2 panch witness has not stated anything about the said demand. Through this panch witness, the prosecution has proved the Seizure Memos, Pre-trap panchnama and Post-trap panchnama.

21. P.W.-3 Nandkishor Borde is also examined, who also acted as a panch. He also narrated the similar fact that the trap Officer has hired one matador, thereafter, they visited the said Police Help Center at Mansar. Their vehicle was restrained by three boys. Thereafter, they proceeded towards Paoni. At Paoni, they were shown the demonstration of Phenolphthalein powder and Sodiam Carbonate solution and instructions were given to them. Thereafter, the trap Officer communicated with one truck driver, who consented to act as a decoy. Thereafter, the ACB Officer sat in the said truck and the tainted note of Rs.50/- was handed over to the truck driver. Again they came to Mansar and at Mansar near Police Help Center the truck was restrained. Thereafter, panch No.1 Bedarkar and the cleaner went inside the Police Help Center and handed over the said amount to the accused. The amount was recovered from the accused No.1. Thus, this witness has also not stated anything about the demand. He only stated that the amount was accepted and thereafter, from that amount, Rs.30/- was returned back to the cleaner.

22. The another material witness is the ACB Officer P.W.4-Prakash Pawar, who reiterated the prosecution's case. As far as the demand and acceptance is concerned, he was not along with the panch Bedarkar and the cleaner. They reached at the spot after

receipt of signal from the panch No.1 Bedarkar. As far as his evidence is concerned, which is only to the extent of recovery of the amount from the accused No.1.

23. P.W.-7 Vinayak Hiware/trap Officer, who lodged the report about the said incident has also testified before the Court vide Exhibit-37. His evidence is also similar to the evidence of P.W.-4 ACB Officer Prakash Pawar. Admittedly, he was also not the witness as to the demand and acceptance. His evidence shows that he communicated with one truck driver, who agreed to work as a decoy. Thereafter, they proceeded to Mansar road near the Police Help Center. Three persons were sitting in Police Help Center. The truck driver handed over the tainted note to the cleaner, and along with the cleaner, panch No.1 went in the said Police Help Center. The cleaner has handed over the tainted note of Rs.50/- to one person who sitting outside the tent on the table and chair. Thereafter, remaining amount of Rs.30/- was handed over to the said cleaner. He admitted that the truck driver and cleaner had left the place of trap in his presence. Admittedly, the truck driver and the cleaner, who acted as a decoy are not examined by the prosecution to substantiate the contention.

24. P.W.-5 Meghnath Damniya is serving as a Police Constable in ACB, Nagpur. His evidence is only to the extent of handing over the complaint to the Ramtek Police Station.

25. P.W.-6 Dilip Tiwari is also a Police Constable at ACB, Nagpur, who acted as a carrier and handed over the articles to C.A.

26. P.W.-8 Prashant Kolwatkar was acting as a Police Station Officer, Ramtek, who recorded the report lodged by the trap Officer. Besides oral evidence, the prosecution placed reliance on Exhibit-45 C.A. Report.

27. On perusal of the charge framed against the accused, the accused was prosecuted for the offence punishable under Section 13(1)(d) of the said Act. As per the allegation of the prosecution that accused has accepted the amount of Rs.50/- as a gratification amount from the truck driver by corrupt or illegal means by abusing his position as a public servant and thereby committed an offence.

28. To prove the offence under Sections 13(1)(d) read with Section 13(2) of the said Act, following are the ingredients of the said Sections, which require to be proved :

<u>under Section 13(1)(d)</u>:

(1) the accused must be a public servant;

(2) by corrupt or illegal means, obtains for himself or any other person any valuable thing or pecuniary advantage; or by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest;

(3) to make out an offence under Section 13(1)(d), there is no requirement that the valuable thing or pecuniary advantage should have been received as a motive or reward;

(4) an agreement to accept or an attempt to obtain does not fall within Section 13(1)(d);

(5) mere acceptable of any valuable thing or pecuniary advantage is not an offence under this provision;

(6) to make out an offence under this provision, there has to be actual obtainment, and

(7) since the legislature has used two different expressions namely "obtains" or "accepts", the difference between these two have to be taken into consideration.

29. After appreciating the evidence on record, as far as demand is concerned, none of the witnesses have stated that there was any demand by the accused. As far as the demand on the day of trap also, the evidence of the prosecution witnesses is silent. The ingredients of Sections 13(1)(d) of the said Act i.e. “obtains” or “accepts” are dealt by the Hon’ble Apex Court.

30. The Constitution Bench of the Honourable Apex Court in the case of ***Neeraj Dutta vs. State (Govt.of NCT of Delhi)*** *cited supra* held that 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. The Honourable Apex Court, while discussing expression “accept”, referred the judgment in the case of ***Subhash Parbat Sonvane vs. State of Gujarat***, reported in ***(2002)5 SCC 86***, wherein it is held that mere acceptance of money without there being any other evidence would not be sufficient for convicting the accused under Section 13(1)(d)(i) of the said Act. In Sections 13(1) and (b) of the said Act, the Legislature has specifically used the words ‘accepts’ or ‘obtains’. As against this, there is a departure in the language used in clause (1)(d) of Section 13 and it

has omitted the word 'accepts' and has emphasized the word 'obtains'. In sub clauses (i) and (ii) (iii) of Section 13(1)(d), the emphasize is on the word "obtains". Therefore, there must be evidence on record that accused 'obtained' for himself or for any other person any valuable thing or pecuniary advantage by either corrupt or illegal means or by abusing his position as a public servant or he obtained for any person any valuable thing or pecuniary advantage without any public interest.

While discussing the expression "accept", the Honourable Apex Court observed that "accepts" means to take or receive with "consenting mind". The 'consent' can be established not only by leading evidence of prior agreement but also from the circumstances surrounding the transaction itself without proof of such prior agreement. If an acquaintance of a public servant in expectation and with the hope that in future, if need be, he would be able to get some official favour from him, voluntarily offers any gratification and if the public servant willingly takes or receives such gratification it would certainly amount to 'acceptance' and, therefore, it cannot be said that as an abstract proposition of law, that without a prior demand there cannot be 'acceptance'. The position will however, be different so far as an offence under Section 5(1)(d) read with Section 5(2) of the 1947 Act is concerned. Under the said Sections, the prosecution has to prove that the accused 'obtained' the valuable thing or pecuniary advantage by corrupt or illegal means or by otherwise abusing his position as a public servant and that too without the aid of the statutory presumption under Section 4(1) of the 1947 Act as it is available only in respect of the offences under Section 5(1)(a) and (b) and not under Section 5(1)(c), (d) or (e) of the 1947 Act. According to this court, 'obtain' means to secure or gain (something) as the result of request or effort. In case of obtainment the initiative vests in the person who receives and in that context a demand or request from him will be a primary requisite for an offence under Section 5(1)(d) of the 1947 Act unlike an offence under Section 161 of the Indian Penal Code, which can be established by proof of either 'acceptance' or 'obtainment'.

31. When a trap is set for proving a charge of corruption against a public servant, evidence about 'acceptance' has its own importance. In the present case as noted above, the accused is not charged of the offence punishable under Section 7 of the said Act wherein, demand is *sine qua non* for establishing the charge. The learned APP placed reliance on the judgment of the Hon'ble Apex Court in ***State of A.P. Vs. P. Satyanarayana Murthy*** (*supra*), wherein the Honorable Apex Court has held that when the evidence of the complainant not suffering

from any infirmity, mere non examination of any person, held, would not render his evidence as a suspicious. It is further held that it is not understood by the High Court that accused not put the application form and the money in different places. The accused did not dispute that the application form was found in a brief case. In fact, the bribe money was also seized. It has been clearly indicated that money was given was kept aside and were not mixed up. The learned APP submitted that it is not a routine case wherein the demand was there and acceptance in perusals of the said demand, in fact here, the secret information was received by the ACB Officer and therefore, with the help of decoy, the trap was arranged and the accused was found accepting the amount. He further submitted that in a Constitution Bench judgment in ***Neeraj Dutta vs. State (Govt.of NCT of Delhi)*** *cited supra,* it is held that Section 13(1)(d) of the Prevention of Corruption Act has the following ingredients which has to be proved before bringing home the guilt of the public servant namely :

(1) the accused was a public servant;

(2) by corrupt or illegal means, obtains for himself or any other person any valuable thing or pecuniary advantage; or by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or while holding office as a public

servant, obtains for any person any valuable thing or pecuniary advantage without any public interest;

(3) to make out an offence under Section 13(1)(d), there is no requirement that the valuable thing or pecuniary advantage should have been received as a motive or reward;

(4) an agreement to accept or an attempt to obtain does not fall within Section 13(1)(d);

(5) mere acceptable of any valuable thing or pecuniary advantage is not an offence under this provision; and

(6) to make out an offence under this provision, there has to be actual obtainment,

32. In Para 6 of the judgment by referring the case of ***Subhash Parbat Sonvane vs. State of Gujarat***, (*supra*) it was observed that mere acceptance of money without there being any other evidence would not be sufficient for convicting the accused under Section 13(1)(d)(i) of the said Act. In Sections 13(1) and (b) of the said Act, the Legislature has specifically used the words 'accepts' or 'obtains'. As against this, there is departure in the language used in clause (1)(d) of Section 13 and it has omitted the word 'accepts' and has emphasized the word 'obtains'. In sub clauses (i) and (ii) (iii) of Section 13(1)(d), the emphasize is on the word "obtains". Therefore,

there must be evidence on record that the accused 'obtains' for himself or for any other person any valuable thing or pecuniary advantage by either corrupt or illegal means or by abusing his position as a public servant or that he obtained for any person any valuable thing or pecuniary advantage without any public interest.

33. As far as abuse of the position is concerned, in case of ***Subhash Parbat Sonvane vs. State of Gujarat*** (*supra*), in para 7, the Honorable Apex Court held that it is enough if by abusing his position as a public servant a man obtains for himself if any pecuniary advantage entirely irrespective of motive or reward for showing favour or disfavour. The Statutory presumption under section 20 of the Act is available for the offence punishable under Section 7 or 11 or Clause (a) and (b) of sub-Section (1) of Section 13 and not for Clause (d) of sub-Section (1) of Section 13 of the said Act.

34. While discussing the expression "accept", it was observed in case ***C.K. Damodaran Nair Vs. Union of India***, reported in ***1997(9) SCC, 477,*** that "accepts" means to take or receive with a "consenting mind". The 'consent' can be established not only by leading evidence of prior agreement but also from the circumstances surrounding the transaction itself without proof of such prior agreement. If an

acquaintance of a public servant in expectation and with the hope that in future, if need be, would be able to get some official favour from him, voluntarily offers any gratification and if the public servant willingly takes or receives such gratification it would certainly amount to "acceptance". Therefore, it cannot be said that as an abstract proposition of law, that without a prior demand there cannot be "acceptance". The position will, however, be different so far as the offence under Section 13(1)(d) read with Section 13(2) is concerned. Under the said Section, the prosecution has to prove that the accused 'obtained' the valuable thing or pecuniary advantage by corrupt or illegal means or by abusing his position as a public servant and that too without the aid of the statutory presumption under Section 20 of the said Act as it is available only in respect of offences under Section 7 and 11 and not under Section 13(1)(d) of the said Act. The Honorable Apex Court expressed 'obtain' means to secure or gain (something) as a result of request or effort. In case of obtainment the initiative vests in the person who receives and in that context a demand or request from him will be a primary requisite for an offence under Section 5(1)(d) of the 1947 Act unlike an offence under Section 161 of the Indian Penal Code, which can be established by proof of either 'acceptance' or 'obtainment'.

35. In the present case, admittedly, the prosecution has not come with the case of a demand and acceptance, but it is the case of the obtainment by misusing the position. In case of obtainment the offer emanates from the public servant that he makes a demand and the bribe-giver accept the offer and tenders the demanded gratification which in turn is received by the public servant. Thus, in case of obtainment, there is a prior demand or illegal gratification by a public servant and in such a case also both the demand and receipt of illegal gratification has to be proved. This act of a public servant is an offence punishable under Section 13(1)(d)(i) and (ii) and therefore, a prior demand by a public servant is a *sine qua non* for an offence under Section 13(1)(d)(i)(ii) of the said Act.

36. Thus in view of the observation of the Honorable Apex Court in the case of ***Neeraj Dutta vs. State (Govt.of NCT of Delhi)*** *cited supra*, even for the offence punishable under Section 13(1)(d)(i)(ii) of the said Act, a prior demand by the public servant is *sine qua non* for an offence. The Honorable Apex Court further referred the judgment of ***B. Jayaraj Vs. State of A.P.***, reported in ***(2014) 13 SCC 55***, ***P. Satyanarayana Murthy Vs. State of A.P.,*** reported in ***(2015) 10 SCC 152*** and ***Kishan Chand Mangal Vs. State of Rajasthan***, reported in ***(1982) 3 SCC 466*** and it is held that if there is a demand

followed by receipt by the public servant the act of obtainment under Section 13(1)(d)(1)(ii) is complete. It is then not necessary to prove motive or reward as the same is for him to Section 13(1)(d)(i)(ii) of the said Act, therefore Section 20 of the said Act does not pertain to legal presumption to be raised for an offence under Section 13(1)(d)(i)(ii) of the said Act.

37. In the light of the above observation, a proof of demand is a *sine qua non*, for convicting the accused in such a cases, it cannot be said that the prosecution has been successful in proving its case beyond reasonable doubts. As observed earlier that in view of the judgment of the Constitution Bench the Honorable Apex Court in ***Neeraj Dutta vs. State (Govt.of NCT of Delhi)*** *cited supra*, the proof of demand is a *sine qua non* to prove the offence punishable under Section 13(1)(d) also. The learned Senior Counsel for the accused placed reliance on catena of decisions wherein also it is held that proof of demand is a *sine qua non* for proving the offence punishable under Section 7 as well as 13(1)(d) of the said Act.

38. As observed earlier that prior demand of the accused is not proved by the prosecution, doubt is created as to the demand and acceptance. The material witnesses are the truck driver and the

cleaner and the three boys who restrained the vehicle, they are not examined by the prosecution. The sanction accorded is also not a valid sanction and it is without application of mind.

39. In the light of the above well settled legal position is that if the evidence is appreciated, there is no dispute as to the fact that the prosecution is under obligation to prove the 'demand' as well as the 'acceptance'. If the entire evidence is appreciated, admittedly, there is no evidence as to the demand as the panch witness i.e. P.W.-2 Vasant Bedarkar is completely silent about the demand by the accused and in pursuance of the demand, there was an acceptance. As the entire case of the prosecution depends upon the acceptance of the amount, but there is no evidence that the amount was demanded by the accused and in perusals of the said demand, the amount was handed over. Admittedly, the word "gratification" is not defined in the said Act. Hence it must be understood in its literal meaning. In the Oxford Advanced Learner's Dictionary of Current English, the work "gratification" is shown to have the meaning "to give pleasure or satisfaction to". The word "gratification" is used 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 the gratification in the sense it is used in the

section. In other words unless the prosecution proves that money paid was not towards any lawful collection or legal remuneration the Court cannot take recourse to the presumption of law. Though the Court is not precluded from drawing appropriate presumption of fact as envisaged in Section 114 of the Evidence Act.

40. In the case of **State of Maharashtra vs. Rashid B.Mulani**, reported in **(2006) 1 SCC 407**, wherein 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 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 proof but he can discharge it on the basis of preponderance of probability.

41. In the present case, as noted above, the evidence as to the demand of illegal gratification is not satisfactory. The evidence shows that after handing over the tainted amount, the accused has returned the amount of Rs.30/-, which is not taken into consideration

either by the ACB Officer or by the Sanctioning Authority while according the sanction. Thus, there is no proof of demand which is a *sine qua none* for convicting the accused in such cases.

42. 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 an independent witness i.e. truck driver and cleaner or the three boys are not examined. I have already observed that principles for according the sanctions are also not taken into consideration. The sanctioning authority expressly admitted that she has not prepared the sanction order, but she has accorded the sanction on the basis of draft sanction order, which was prepared by ACB Office.

43. Thus, keeping in mind all the relevant facts and material and the evidence on record and the fact that entire exercise carried out by the Sanctioning Authority is without application of mind. The evidence as to the demand and acceptance is also not satisfactory. In view of that, the appeal deserves to be allowed and, therefore, I proceed to pass following order :

ORDER

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

(2) The judgment and order of conviction and sentence dated 27.07.2005 passed by learned Judge, Special Court, Nagpur in Special (ACB) Case No.15/1998 convicting and sentencing the accused is hereby quashed and set aside.

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

The appeal stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

Kirtak