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

CRIMINAL APPEAL NO.525 OF 2005

Kashinath Sitaram More,
aged 33 years, occupation : service,
r/o Risod, district Washim. ..... **Appellant.**

:: VERSUS ::

State of Maharashtra,
through Dy.Superintendent of Police
Anti Corruption Bureau, Akola,
through PSO Police Station,
Risod, district Washim. ..... **Respondent**.

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Shri Anil S.Mardikar, Senior Counsel assisted by Shri S.Kanetkar, Counsel for the Appellant.
Shri N.B.Jawade, Additional Public Prosecutor for the State.

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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 06/08/2024

PRONOUNCED ON : 22/08/2024

JUDGMENT

1. The judgment and order dated 26.9.2005 passed by learned Special Judge, Washim (learned Trial Judge) in Special Case No.3/2002 is the subject-matter of challenge in the present appeal by the appellant (the accused).

2. By the judgment impugned in the appeal, the accused is convicted for offence punishable under Section 7 of the Prevention of Corruption Act, 1988 (the said Act) and sentenced to undergo rigorous imprisonment for three years and to pay fine Rs.5000/-, in default, to undergo further simple imprisonment for three months.

He is further convicted for offence punishable under Section 13(1)(d) read with 13(2) of the said Act and sentenced to undergo rigorous imprisonment for five years and to pay fine Rs.10,000/-, in default, to undergo further simple imprisonment for five months.

3. Learned Trial Judge directed that all sentences of the accused shall run concurrently and set-off under Section 428 of the Code of Criminal Procedure was also given to him since he was in jail.

4. Facts, in a nut shell, giving rise to the appeal are as given below:

5. Dinkar Sakharam Ambhore (the Complainant), was residing along with his parents, two brothers and sisters. One of his sisters Smt.Shobha is widow and residing at his house.

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He was looking after affairs of her property received from her husband. After demise of husband of his sister, she claimed interest in the property of her husband, but her in-laws by joining hands with Revenue Authorities got their names mutated along with his sister Shobha. It was objected by her through the Complainant by filing an application with Revenue Authorities. The Complainant through his sister filed an appeal, which was pending before the Tahsildar. The Complainant was attending dates along with his sister. The accused serving as clerk in Risod Tahsil Office was looking after day to day affairs of cases filed before the Tahsildar. On many occasions, the appeal filed by the Complainant was adjourned without any reasons and the accused informed that nothing would happen in the matter unless amount Rs.10,000/- was paid to the Tahsildar and Rs.2000 to him. The accused further told the Complainant that if the money is not paid, more ten years nothing would happen in the appeal and it would remain pending. On 15.5.2001, at about 12:00 to 12:30 pm, the Complainant met the Tahsildar and informed his grievance in the matter of his sister. He also disclosed the Tahsildar that the demand was made by the accused on his name. On 18.4.2001, the Complainant went in the office of

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the Tahsildar. On that day, the next date was given 24.4.2001. On that day also, the accused demanded the amount. The Complainant paid Rs.11000/- and Rs.1000/- remained to be paid. On 31.5.2001, the Tahsildar passed the order in the said appeal. After 31.5.2001, the Complainant filed an application on 7.7.2001 and met the accused. The accused demanded remaining amount Rs.1000/- and told that unless Rs.1000/- is paid he would not place the application before the Tahsildar. After a negotiation, it was decided that the Complainant to pay Rs.500/- and remaining amount Rs.500/- to be paid after the work is completed. As the Complainant was not desiring to pay the amount, he approached the office of the Anti Corruption Bureau at Akola (the bureau) and lodged a report.

6. After receipt of the report, officers of the bureau called two panchas. In presence of panchas, the Complainant narrated the incident which was verified by panchas from the First Information Report. After following a due procedure, it was decided to conduct a trap. The Complainant produced five currency notes of Rs.100/- denomination. A demonstration as to use and characteristics of phenolphthalein powder and sodium carbonate was shown.

The said solution was applied on the tainted amount and the same was kept in shirt pocket of the Complainant. The Complainant and pancha No.1 were given some instructions. As per instructions, the Complainant was directed to hand over the amount only on demand; pancha No.1 was directed to remain with the Complainant, and pancha No.2 was directed to remain with raiding party members. Accordingly, a pre-trap panchanama was drawn.

7. After the pre-trap panchanama, the Complainant and pancha No.1 approached the accused. During communication between the Complainant and the accused, the accused demanded amount. Accordingly, the Complainant handed over tainted notes. The accused further asked the Complainant to bring remaining amount within 4-5 days. After giving a predetermined signal, the trap officer and other raiding party members caught the accused. The amount was recovered from the accused. The hand wash of the accused so also the Complainant was collected. The investigating officer obtained a sanction. After completion of the investigation, chargesheet came to be filed against the accused.

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8. During trial, the prosecution examined in all five witnesses namely Dinkar Sakharam Ambhore vide Exhibit-20 (PW1), the Complainant; Munir Nijam Mujawar vide Exh.26 (PW2), the Sanctioning Authority; Dipak Dattatraya Ingle vide Exhibit-34 (PW3), the Shadow Pancha; Kailas Vasantrao Solanke vide Exhibit-48 (PW4), the Pancha No.2; Hafij Gulam Nabi Shaikh vide Exhibit-56 (PW5), the Trap Officer.

9. The accused has also examined two witnesses in support of his defence namely Prakash Santoshrao Navghare vide Exhibit-98 (DW1) and Wasudeo Shankar Pande vide Exhibit-104 (DW2). As per the defence of the accused, the amount was paid towards “Kisan Vikas Patra”.

10. Besides the oral evidence, the prosecution placed reliance on 7/12 extract Exhibit-21, order passed by the Tahsildar on 31.5.2001 Exhibit-.22, complaint Exhibit-23, Sanction Order Exhibit-27, pre-trap panchanama Exhibit-29, seizure memo Exhibit-30, Kisan Vikas Patra in the name of the Complainant Exhibit-33, seizure memos Exhibits-35 and 36, letter to the Tahsildar Exhibit-37, 7/12 extract Exhibit-38, letter to the Tahsildar Exhibit-39, seizure memo Exhibit-.40, order sheet of Appeal No.591/2001 Exhibit-40/1, seizure

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memos Exhibits-41, 42 and 44, post-trap panchanama Exhibit-46, map Exhibit-62, report Exhibit-63, First Information Report Exhibit-64, and the Chemical Analyzer's Report Exhibit-71.

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

12. Heard learned Senior Counsel Shri Anil S.Mardikar for the accused and learned Additional Public Prosecutor Shri N.B.Jawade for the State. I have been taken through the entire evidence on record so also the judgment impugned in the appeal.

13. Learned Senior Counsel for the accused submitted that defence of the accused is that the amount was accepted towards "Kisan Vikas Patra". The evidence on record sufficiently shows that a target was given to the Tahsildar of all districts to get investment from people in "Kisan Vikas Patra". This fact is not only admitted by Complainant PW1 Dinkar but also documents collected during the investigation and the evidence of defence witnesses sufficiently show that in view of the said target, the amount was accepted.

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As to the sanction, learned Senior Counsel submitted that the sanction was accorded without application of mind which reveals from the entire evidence as well as from the Sanction Order.

Thus, the admission on record given by the Complainant, documentary evidence, and defence witnesses sufficiently show that the amount was paid against the investment.

As far as the allegation of the Complainant, as to the demand, is concerned, the same is not corroborated by the evidence either by his sister or any other evidence. The Investigating Officer has also not verified whether allegations are genuine or not. The proof of demand is *sine qua non* to establish charges which itself is absent in this case. In view of the same, the judgment impugned in the appeal deserves to be quashed and set aside.

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

1. Neeraj Dutta vs. State (Govt.of NCT of Delhi)[1];

1 2023 SCC OnLine SC 280

2. C.M.Girish Babu vs. CBI, Cochin, High Court of Kerala[2], and

3. Wasudeo s/o Nathuji Ukey vs. The State of Maharashtra, thr.PSO PS Andhalgaon, tahsil Mohadi, district Bhandara[3].

15. 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 ground that the sanction was accorded without application of mind.

16. In order to prove the Sanction Order, the prosecution examined Sanctioning Authority PW2 Munir Nijam. As per his evidence, at the relevant time, he was serving as Collector at Ashti. He received investigation papers and, thereafter, drafted the Sanction Order and granted the sanction. The Sanction Order is at Exhibit-27. The cross examination of the said witness shows that he admitted that target for Small Saving Scheme was given to each taluka of district Washim. The said target is to be achieved by all employees in the taluka. The employees have pursued the target achievement and agents are supposed to collect the amount. He further admitted that if it was come to his notice that the accused

2 (2009)3 SCC 779
3 Criminal Appeal No.247/2005 decided by this court on 5.10.2023

accepted the amount under the Scheme to achieve the target, he would not have issued the sanction.

Thus, from the cross examination of the said witness, an attempt was made to establish that the amount was accepted towards the target of Small Saving Scheme.

17. Perusal of the Sanction Order reveals that Sanctioning Authority PW2 Munir Nijam reproduced the entire prosecution case and in second last paragraph, it is mentioned that after carefully evaluating the evidence on record, he was satisfied that there is an adequate evidence to prosecute the accused and, therefore, he accorded the sanction.

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

19. The Honourable Apex in the case of **Mohd.Iqbal Ahmad vs. State of Andhra Pradesh**[4] has held that what the Court has to see 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

4 1979 AIR 677

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.

20. The Honourable Apex Court, in another decision, in the case of **CBI vs. Ashok Kumar Agrawal**[5], 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

5 2014 Cri.L.J.930

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.

21. The Honourable Apex Court, in the case of **State of Karnataka vs. Ameerjan**[6], held that it is true that an order of sanction should not be construed in a pedantic manner.

6 (2007)11 SCC 273

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 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.

22. In the present case, the Sanction Order was challenged on ground of non-application of mind.

23. In view of the settled principles of law, the sanctioning authority has to apply his/her own independent mind for generation of its satisfaction for sanction. In short, 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.

24. Thus, the application of mind on the part of the Sanctioning Authority is imperative. The orders granting sanction must demonstrate that he/she has applied his/her mind while according sanction.

25. After going though the evidence of Sanctioning Authority PW2 Munir Nijam, though he stated that after reading, he accorded the sanction, his admission during the cross examination shows that the target for Small Saving Scheme was given to each taluka including Washim district and the said target is to be achieved by all employees. He further admitted that if it was come to his notice that the accused accepted the amount under the Scheme, he would not have issued the sanction. The Sanctioning Authority has not considered Exhibit-33 which is "Kisan Vikas Patra" issued in the name of Complainant PW1 Dinkar. Thus, enquiry by the Sanctioning Authority to ascertain truth was not conducted.

26. Admittedly, grant of sanction is a serious exercise of power by the competent authority. No doubt, elaborate

discussion is not required, however, decision making on relevant materials should be reflected in order.

27. After going through the evidence of Sanctioning Authority PW2 Munir Nijam, 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 conclusion that the sanction is to be accorded to launch prosecution against the accused.

28. Thus, the Sanction Order accorded is without application of mind.

29. Besides the issue of the sanction, the prosecution claimed that the accused demanded gratification amount and accepted the same.

30. To prove the demand and acceptance, the prosecution mainly placed reliance on the evidence of Complainant PW1 Dinkar and Shadow Pancha No.3 Dipak Ingle.

31. A sum and substance of the evidence of Complainant PW1 Dinkar is that his sister Shobha is widow and he was

looking after affairs as to the agricultural property of said Shobha. After the death of husband of Shobha, on behalf of her, the Complainant filed an application to mutate her name as regards Gat No.75. The said application was pending before the Tahsildar, Risod for adjudication. The accused who was serving as clerk and looking after day to day affairs of cases filed before the Tahsildar demanded amount Rs.10,000/- for the Tahsildar and Rs.2000/- for him. His application was not decided and adjourned time to time and, therefore, he met the Tahsildar also and disclosed that the accused is demanding gratification amount. In the meantime, the Tahsildar decided the application on 31.5.2001 in favour of his sister. After decision of the said application, he met the accused on 9.7.2001 along with the application for mutating the name of his sister, but the accused demanded remaining amount Rs.1000/- and asked him to pay Rs.500/- on 9.7.2001 and remaining amount Rs.500/- on 12.7.2001. As the Complainant was not desiring to pay the amount, he approached the office of the bureau and lodged the complaint. His evidence further shows that various events took place during the pre-trap panchanama. As far as the demand on the day of the trap is concerned, he deposed that when he along

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with Shadow Pancha No.3 Dipak Ingle approached the accused, there was communication between him and the accused. He enquired the accused as to whether his work was done or not. On that, the accused asked him whether he brought money. The Complainant told that he brought Rs.500/-. On the demand by the accused, he handed over the said amount to the accused which was accepted by left hand and taken in right hand and kept in pant pocket. Thereafter, he gave a signal. The accused was caught. The hand wash of the accused as well as the Complainant was collected. The amount was also recovered from the accused.

32. Defence of the accused is of total denial and the amount was accepted towards the Small Saving Scheme. It was contended that the amount paid to him was against "Kisan Vikas Patra". In pursuance of the defence, cross examination of Complainant PW1 Dinkar was carried out. During the cross examination, the Complainant specifically admitted that amount Rs.500/- was paid by him to the accused for purchase of "Kisan Vikas Patra". The document "Kisan Vikas Patra" placed on record at Exhibit-33 shows the name of the Complainant.

33. On the admission of Complainant PW1 Dinkar, that he paid the amount against purchase of “Kisan Vikas Patra”, he was cross examined, but nothing transpired during his cross examination. He has also placed on record 7/12 extract of gat No.75 wherein the name of his sister was entered. The order of the Tahsildar is at Exhibit-22 dated 31.5.2001. Perusal of the order of the Tahsildar reveals that the dispute arose between the sister of the Complainant and her in-laws on account of ownership of land gat No.75 and it is held by the Tahsildar that names of wife of the deceased and mother of the deceased are to be entered as his legal heirs in respect of gat No.75. It is pertinent to note that the said order was passed on 31.5.2001 itself i.e. prior to the trap.

34. To corroborate the version of Complainant PW1 Dinkar, Shadow Pancha No.3 Dipak Ingle was also examined. The Shadow Pancha testified as to various events took place during the pre-trap panchanama. As to the demand and acceptance on the day of the trap, his evidence shows that he and the Complainant approached the accused. At relevant time, three persons were present near table of the accused. At the relevant time, the accused had been to chamber of the Tahsildar. After some time, he came there and the

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Complainant asked about his work on which the accused demanded Rs.500/-. The accused accepted the amount by left hand and, thereafter, kept it in a right hand and put in the right pant pocket. After acceptance of the amount, a pre-determined signal was given. The accused was caught. The amount was recovered from him. The hand wash of the Complainant and the accused was also collected.

35. Thus, as to the demand and acceptance, the evidence of Shadow Pancha No.3 Dipak Ingle is to the extent that there was a demand and the amount was accepted. Though the Shadow Pancha is cross examined, nothing material came on record as the Shadow Pancha denied that the Complainant was asked to put his signature on “Kisan Vikas Patra” and he did his signature on it. However, the Shadow Pancha stated that he is unable to state as to whether the Complainant put his signature on any paper while they were at the table of the accused. He has also assigned a reason that as there were people around the people, he could not say about the same. The Shadow Pancha admitted during the cross examination that at the relevant time, the Complainant asked about his work and there was no any other reference about the nature of the amount.

36. As to the acceptance, undisputedly, the amount was recovered from the accused. PW4 Kailas Solanke is Pancha No.2 who removed the said amount from the pant pocket of the accused.

37. Trap Officer PW5 Hafij Gulab Nabi Shaikh, is also examined vide Exhibit-56. As far as the demand is concerned, he is not direct witness, but as to the acceptance his evidence is that after signal of the Complainant, he caught the accused and the amount was recovered from him. From his cross examination, it reveals that immediately the accused gave his explanation, which was noted in post-trap panchanama. He denied the contention that the accused requested him to seize the application of signature of the Complainant which was “Kisan Vikas Patra”.

38. As regards the defence of the accused, he examined DW1 Prakash Navarro and DW2 Wasudeo Pande.

DW1 Prakash Navghare, at the relevant time, was the Assistant Director of Social Welfare (Small Saving) at Washim, who testified that he had received target from the Government for Small Saving Schem. Whenever such targets are received, he has not submitted proposal before the Collector for implementation of the target. The Tahsildar has responsibility to complete the quota. Similarly, Risod Tahsildar was also allotted with the said target and communication was also made to that effect. The Tahsildar has to achieve the target with the help of his staff members. So also, there were private agents for collection of Small Saving Amount. He admitted during the cross examination that in document Exhibit-100, it is not mentioned that the Tahsildar has to satisfy the target through his staff members. There was no written order that the Head of the Department shall comply the target through their subordinate staff. Exhibit-101, is the list of allotment of the target to the Head of the Department wherein name of the Tahsildar, Risod is mentioned.

DW2 Wasudeo Pande, is agent appointed for the Small Saving Scheme. The defence witness also testified that he was deputed as an agent for the Small Saving Scheme. It came in his evidence that the accused used to receive the amount for him from customers and he was obtaining signatures on such forms. In evening, the accused used to hand over the amount to him along with forms. He was maintaining register of such bonds. He has also submitted

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extract of register Exhibit-105 wherein the name of the accused is mentioned.

39. Thus, to substantiate the defence, the accused placed reliance on the evidence of defence witnesses DW1 Prakash Navghare and DW2 Wasudeo Pande as well as on the cross examination of Complainant PW1 Dinkar and Shadow Pancha No.3 Dipak Ingle.

40. From the cross examination of Complainant PW1 Dinkar and Shadow Pancha No.3 Dipak Ingle, it reveals that the Complainant specifically admitted that he paid the amount against the “Kisan Vikas Patra”. The cross examination of the Shadow Pancha also shows that except the communication as regards the work, there was no other communication between Complainant and the accused. Exhibit-33 is copy of the “Kisan Vikas Patra” wherein name of the Complainant is mentioned. Thus, not only the defence of the accused but also the document on record shows that “Kisan Vikas Patra” was issued in the name of the Complainant. Perusal of the evidence of the Complainant reveals that he and his sister Shobha attended the office of the Tahsildar on several occasions. Thus, the alleged demand was made in presence of said

Shobha. Admittedly, said Shobha is not examined by the prosecution. The evidence of the Shadow Pancha shows that at the relevant time on the day of the trap 2-3 persons were present around the table of the accused. None of them was examined by the prosecution to substantiate that the accused demanded the amount and accepted the same. Admittedly, the Complainant himself is in the nature of accomplice and his story *prima facie* to be corroborated by the independent evidence.

41. In the case of **M.O.Shamsudhin vs. State of Kerala[7],** 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 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.

7 (1995)3 SCC 351

42. In the case of **Bhiva Doulu Patil vs. State of Maharashtra**[8] 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."

43. In the case of **Panalal Damodar Rathi vs. State of Maharashtra**[9] *supra*, it is observed by the Honourable Apex Court that after introduction of Section 165-A of the Indian Penal Code 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

8 1963 Mh.L.J. (SC) 273
9 (1979)4 SCC 526

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, whether this part of the evidence of the Complainant has been corroborated.

44. Thus, a fact required to be considered is that the evidence of Complainant PW1 Dinkar will have to be scrutinized meticulously. The testimony of such person requires careful scrutiny.

45. Admittedly, no independent witness is examined by the prosecution though the evidence specifically shows presence of independent witnesses at the time of the trap. As to the earlier demand, sister Shobha of the Complainant, who was present, was also not examined.

46. The evidence of Complainant PW1 Dinkar and Shadow Pancha No.3 Dipak Ingle specifically shows that there was a communication prior to the demand and acceptance of the money. The evidence shows that the accused demanded the money on enquiring by the Complainant about his work. Thus, it reveals that the accused had made enquiry that whether the

money had been brought or not, which is not sufficient. Insofar as the demand of the amount is concerned, the same is washed out during the cross examination as the Complainant admitted that the amount was accepted towards the Small Saving Scheme. Even, if the evidence is considered that there was enquiry by the accused, the same is not sufficient to constitute the demand.

47. In the case of **Mukhtiar Singh (since deceased) through his LR vs. State of Punjab**[10], it is held that statement of complainant and inspector, the shadow witness in 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.

48. Thus, as far as the demand and acceptance is concerned, the evidence adduced by the prosecution, especially of Complainant PW1 Dinkar as to the previous demand, falls short as the same is not corroborated by any

10 2017 SCC ONLine SC 742

evidence. Moreover, Trap Officer PW5 Hafij Gulab Nabi Shaikh has also not verified as to genuineness of the demand. The demand on the day of the trap is falsified in the light of the admission given by Complainant and Shadow Pancha No.3 Dipak Ingle who has stated that except communication, regarding the work, there was no any other reference during the communication.

49. Thus, the entire evidence of Complainant PW1 Dinkar and Shadow Pancha No.3 Dipak Ingle falls short to prove the demand and acceptance.

50. It is well settled that demand can be proved by direct as well as circumstantial evidence.

51. The Honourable Apex Court in the case of **Neeraj Dutta** *supra* held that fact in issue namely proof of demand and acceptance of illegal gratification can also be proved by circumstantial evidence in absence of direct, oral, and documentary evidence.

52. In the present case, the prosecution relied upon circumstantial evidence i.e. Chemical Analyzer's Report, which shows test of phenolphthalein powder and sodium carbonate

solution as positive, but as already observed earlier, from the evidence adduced it reveals that the amount was accepted by the accused towards the Small Saving Scheme.

53. It is well settled that to attract presumption, the prosecution has to prove foundational facts. Insofar as applicability of presumption is concerned, the Constitution Bench of the Honourable Apex Court in the case of **Neeraj Dutta vs. State (Govt.of NCT of Delhi**) *supra* 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 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.

54. In the instant case, as observed earlier, the prior demand by the accused is neither proved by the prosecution nor the demand on the day of the trap is proved. The defence of the accused is not only substantiated by him by examining defence witnesses but also it is substantiated by documents as well as the cross examination of Complainant PW1 Dinkar who specifically admitted that the amount was paid towards Small Saving Scheme. Moreover, Exhibit-33, the “Kisan Vikas Patra” also substantiates the same.

55. It is well settled that proof of demand is *sine qua non* to prove the offence against the accused.

56. After going through the evidence adduced, it reveals that a doubt is created as far as the demand is concerned. The prosecution has not examined independent witnesses though they were available. Thus, the prosecution case, as far as the demand by the accused is concerned, fails. The sanction is also not valid as it was accorded without application of mind.

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Thus, on the ground of sanction also, the prosecution case fails.

57. In the light of the above, since I find that the appeal deserves to be allowed, following order is passed:

<u>ORDER</u>

(1) The Criminal Appeal is **allowed**.

(2) The judgment and order dated 26.9.2005 passed by learned Special Judge, Washim in Special Case No.3/2002 convicting and sentencing the accused is hereby quashed and set aside.

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

Appeal stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!