



Judgment

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

CRIMINAL APPEAL NO.424 OF 2016

Sanjay s/o Wasudeo Chinchmalatpure,
aged about 49 years, occupation : service,
r/o Sandekar lay-out, plot No.27,
Besa Road, Manewada, Nagpur-34. **Appellant.**

:: VERSUS ::

State of Maharashtra,
through Anti Corruption Bureau, Nagpur.
Crime Registered at police station :
Sitabuldi, Nagpur. **Respondent.**

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Shri S.V.Sirpurkar, Counsel for the Appellant.
Shri A.B.Badar, Additional Public Prosecutor for the State.

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CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 03/05/2024
PRONOUNCED ON : 05/07/2024

JUDGMENT

1. By this appeal, the appellant (the accused) has challenged judgment and order of conviction and sentence dated 26.10.2016 passed by learned Special Judge, Special Court for ACB, Nagpur (learned Judge of the trial court) in Special (ACB) Case No.04/2010 whereby he is convicted for offence punishable under Section 8 of the Prevention of Corruption Act, 1988 (the

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said Act) and sentenced to undergo rigorous imprisonment for three years and to pay fine Rs.2000/-, in default, to undergo rigorous imprisonment for two months.

2. Brief facts of the prosecution case are as under:

Complainant Mohd.Akram s/o Mehmood Ahmad, a resident of Nagpur, was prosecuted for offence punishable under Section 304 of the Indian Penal Code registered with the Koradi Police Station, Nagpur on an allegation that he was doing construction work of Asharfiya Mosque and one of workers died due to electric shock and, therefore, he committed the offence under the said Section. Regarding the said crime, Sessions Trial No.63/2008 was pending against him in the court of learned Ad-hoc District Judge, Court No.8, Nagpur.

3. The accused was working as Junior Clerk in the said court. The evidence of the prosecution was closed and the matter was fixed for final arguments on 21.3.2009. A week prior to that, he allegedly demanded Rs.35,000/- in order to get acquittal of the complainant of the said case. As per allegation, he assured the

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complainant that he will manage the Presiding Officer and he exchanged his mobile number with the complainant. He and the complainant had conversations on eight to ten occasions and during that conversations, the complainant requested him to reduce the amount. After negotiation, he told the complainant that he has to pay amount Rs.25,000/-, else his work will not be done. On 19.3.2009, the complainant made a phone call to him and informed him that he is unable to pay this much amount. On that, the accused asked to pay Rs.10,000/-. On the next date, i.e. 20.3.2009, between 3:00 to 4:00 pm, the complainant was called by the accused in the court's canteen and also asked him to pay the remaining amount after 3-4 days. As the complainant was not desiring to pay the amount, on 20.3.2009 he approached the office of the Anti Corruption Bureau at Nagpur and lodged a report.

4. After receipt of the complaint, officials of the bureau called two panchas. The complaint was read over to panchas and they have also perused the complaint. The complainant produced bribe amount of ten currency notes of Rs.1000/- denomination.

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The demonstration as to phenolphthalein powder mixed with sodium carbonate was explained to them. After completing necessary formalities, pre-trap panchanama was drawn.

5. After the pre-trap panchanama, when the complainant and panchas and raiding party members were about to leave for the trap, the complainant received a call from the accused on his mobile. The call was kept on a speaker mode and conversation was heard. From the said conversation, it revealed to panchas and raiding party members that the accused is present at Joshi Juice Centre, near Sandipani School and waiting for the complainant and, therefore, asked the complainant as to when he is coming there. The complainant informed him that he will reach there within fifteen minutes. Accordingly, the complainant proceeded along with pancha No.1 on his motorcycle and pancha No.2 and other raiding party members followed them. The complainant and pancha No.1 met the accused. During communication, the accused asked about the bribe amount and accepted it. After receiving a predetermined signal, raiding party members along with the pancha reached and the accused was

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caught. Immediately, fingers of the accused and the complainant were dipped separately in a solution and the said solution was collected in separate bottles. The tainted amount was recovered from the accused. Accordingly, post-trap panchanama was drawn.

6. During investigation, the Investigating Officer seized relevant documents as well as service record of the accused. After completion of the investigation, chargesheet was filed against the accused.

7. To substantiate allegations, the prosecution examined in all three witnesses, namely Mohd.Akram s/o Mehmood Ahmad vide Exhibit-31 (PW1), the complainant; Mangesh Vinayakrao Deshmukh vide Exhibit-44 (PW2), the shadow pancha, and Rajesh Duddalwar vide Exhibit-71 (PW3), the Trap Officer.

8. Besides the oral evidence, the prosecution further relied upon complaint Exhibit-36, personal search panchanama of the complainant Exhibit-37, seizure memo regarding articles of the complainant Exhibit-38, post-trap personal search panchanama of the complainant Exhibit-39, pre-trap panchanama Exhibit-45,

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post-trap personal search panchanama of the accused Exhibit-47, post-trap panchanama Exhibit-50, map Exhibit-48, written explanation of the accused Exhibit-49, report lodged by the Trap Officer Exhibit-73, FIR Exhibit-75, letter to the Chemical Analyzer Exhibit-77, the Chemical Analyzer's Report Exhibit-79, and CDRs are Exhibit-94 and 95.

9. After considering the evidence adduced during the trial, learned Judge of the trial court held the accused guilty as the aforesaid.

10. I have heard learned counsel Shri S.V.Sirpurkar for the accused and learned Additional Public Prosecutor Shri A.B.Badar 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.

11. Learned counsel for the accused submitted that learned Judge of the trial court erroneously convicted the accused under Section 8 of the said Act. Section 8 of the said Act has been incorrectly invoked. The allegations relate to Sections 7 and

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13(1)(d) read with 13(2) of the said Act. He submitted that the entire investigation showing that the accused has committed the offence under Section 8 of the said Act is tainted investigation. Learned Judge of the trial court has also committed an error while framing charge against the accused under Section 8 of the said Act which relates to offering gratification by corrupt or illegal means to influence public servant. The relevant portion of the charge shows that the charge is framed incorrectly. The sum and substance of allegations against the accused do not disclose commission of offence under Section 8 of the said Act. It, in fact, discloses commission of offence under Section 7 of the said Act. Offence under Section 8 of the said Act can be lodged against any person. Whereas, offence under Section 7 of the said Act is restricted to public servants. The accused is a public servant and allegations made against him shall attract offence under the said Act. Section 7 of the said Act cannot be invoked by remanding the matter back to the trial court as no sanction is obtained under Section 19 of the said Act. In absence of the sanction under Section 19 of the said Act, the court cannot take cognizance of offence under Section 7 of the said Act. As the prosecution has

failed to obtain the sanction, the matter cannot be remanded back to the court below as no purpose would be served. He further submitted that even considering allegations as it is, no offence is made out against the accused and, therefore, the accused be acquitted of charges by setting aside the judgment impugned in the appeal.

12. *Per contra*, learned Additional Public Prosecutor for the State submitted that the evidence of prosecution witnesses sufficiently shows involvement of the accused. Learned Judge of the trial court has rightly appreciated the evidence and rightly convicted the accused.

13. The accused is facing charge on an allegation that he has demanded the bribe amount from the complainant on an assurance that he will manage the Presiding Officer and the complainant would be acquitted of charges under Section 304 of the Indian Penal Code if he pays amount Rs.25,000/- to him. To substantiate the said allegation, the prosecution has placed reliance mainly on the evidence of PW1 complainant Mohd.Akram Mehmood Ahmad and PW2 shadow pancha Mangesh Deshmukh.

14. It is well settled that demand and acceptance can be proved on the basis of direct as well as circumstantial evidence. It is also well settled that proof of demand of bribe by a public servant and its acceptance by him is *sine qua non* for establishing offences under the said Act.

15. The Constitution Bench of the Honourable Apex Court in the case of **Neeraj Dutta vs. State (Govt.of NCT of Delhi)**¹ held that for recording conviction under Sections 7 and 13 (1)(d)(i) (ii) of the said Act, the prosecution has to prove the demand and acceptance of illegal gratification either by direct evidence which can be in the nature of oral or documentary evidence or by circumstantial evidence in the absence of direct or oral evidence. It further held that under Section 7 of the said, 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 by the bribe giver and in turn there is a payment made which is received by the public servant, would be

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an offence of obtainment under Section 13(1)(d) and (i) and (ii) of the said Act.

16. In the light of the well settled principle of law, if the evidence of PW1 complainant Mohd.Akram Mehmood Ahmad is appreciated, it shows that he was prosecuted of the offence punishable under Section 304 of the Indian Penal Code and Session Case No.63/2008 was pending against him in the court of learned Ad-hoc District Judge, Court No.8, Nagpur. The accused was working as Junior Clerk in the said court. In the said case, the evidence of the prosecution was closed and the matter was fixed for final arguments on 21.3.2009. Prior to one week, the accused approached the complainant and demanded Rs.35000/- in order to get his acquittal. He also assured him that he will manage and exchanged his mobile number. As per the evidence, as the complainant was not desiring to pay the amount, he approached the office of the bureau and lodged the complaint. The complainant has narrated about the demand by the accused and also testified that on his request, the accused reduced the amount to Rs.25000/-. As the complainant disclosed to him that

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he is unable to pay such amount, the accused shown readiness to accept amount Rs.10,000/- and called the complainant in one Juice Centre. The complainant has narrated about various procedures carried out during pre-trap panchanama. As per his evidence, he along with PW2 Shadow Pancha Mangesh Deshmukh approached the accused in Joshi Juice Centre. There was a communication between them and during the communication, the accused demanded the amount . He took it from left pocket of his shirt and delivered it in the right hand of the accused. The accused has kept the same in right side pocket of his pant. On giving signal by the complainant, the raiding party members caught the accused. His personal search was taken. The tainted amount was recovered from the accused. The explanation of the accused was that the complainant handed over the amount forcefully. The right hand of the accused was dipped into the liquid and the same liquid was collected. The hands of the complainant was also dipped in the said solution separately and the said solution was collected in a separate bottle. After due procedure, the post-trap panchanama was drawn and the Trap Officer lodged the report. The cross examination of the

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complainant shows that the accused was not working as Bench Clerk, but he was working as clerk in the said court. It further came in his cross-examination that the complainant used to meet the accused during hearing of the case. Thus, from the cross examination, an attempt was made that there was no demand, but it was the complainant who forcefully handed over the said amount to the accused by calling him at the Juice Centre. The cross examination further shows that on the day of the trap, the accused was on leave and it was the complainant who offered juice to the accused and, thereafter, they went at the basement. Thus, the entire attempt was to show that there was no demand by the accused, but the amount was thrust in his hand by the complainant.

17. To corroborate the version of PW1 complainant Mohd.Akram Mehmood Ahmad, the prosecution also examined PW2 shadow pancha Mangesh Deshmukh, acted during the trap. As per his evidence, he was called as pancha and, therefore, he approached the office of the bureau whereat he met the complainant. The Trap Officer informed him that the complaint is

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received against a public servant about demand of bribery and introduced him with the complainant. He and another pancha read contents of the complaint and, thereafter, the complainant produced the tainted amount. He narrated about the procedure carried out by the Trap Officer during the pre-trap panchanama. As per his evidence, characteristic as to phenolphthalein powder and sodium carbonate was narrated to them with demonstration. When they were about to leave for the trap, the complainant received a phone call of the accused and the accused called him at Joshi Juice Centre. Accordingly, they proceeded on a motorcycle of the complainant and other trap members followed them. They met the accused at Joshi Juice Centre. The complainant introduced him with the accused. There was a communication between the complainant during which the accused demanded the amount and complainant handed over the same. The accused accepted the amount by his right hand and kept the same in right side pocket of his full pant. On receiving signal, the Trap Officer caught the accused. The amount was recovered from the accused. The fingers of right hand of the accused were dipped in liquid and the said solution was collected. The handkerchief, taken out from

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the full pant of the accused, was also dipped in the liquid and the solution was collected in one bottle. The amount recovered from the accused was seized. Accordingly, post-trap panchanama was drawn.

18. To substantiate the defence, PW2 shadow pancha Mangesh Deshmukh was cross examined and it is attempted that there was no demand by the accused, but the amount was thrust by PW1 complainant Mohd.Akram Mehmood Ahmad, which is denied by the said pancha. It is brought on record that due to noise, he was unable to hear the conversation, but the said pancha explained that he was unable to hear the conversation from long distance. Thus, the said pancha has not supported the version of the defence that the amount was thrust in the hands of the accused.

19. The prosecution has also examined PW3 Trap Officer Rajesh Duddalwar. Admittedly, his evidence is not on the demand and acceptance. However, his evidence shows that when he along with raiding party members was about to leave for the trap, PW1 complainant Mohd.Akram Mehmood Ahmad received a phone call

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of the accused. On his request, the complainant put the said call on speaker and he heard the conversation that the complainant should come at Joshi Juice Centre and informed the complainant that he is waiting there. His evidence further shows that after receipt of the signal, he caught the accused. The amount was recovered from the accused. The fingers of the right hand of the accused were dipped in the solution and the said solution was also collected. The handkerchief of the accused, which was in his pant pocket, was also dipped into the solution and the said solution was collected. During investigation, he collected CDRs of the mobile phone of the complainant and CDRs of the mobile of the accused, which are at Exhibits-94 and 95.

Thus, besides the oral evidence, the prosecution also relied upon circumstantial evidence in the nature of CDRs. Though the Trap Officer is cross examined, his evidence is not shattered.

20. On the basis of the above said evidence, the prosecution claimed that the prosecution has proved its case beyond reasonable doubt. Whereas, learned counsel for the accused

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vehemently submitted that the chargesheet is filed under Section 8 of the said Act, which has been incorrectly invoked, charge is incorrectly framed, and the trial is also conducted on erroneous charge. Section 8 of the said Act is not at all attracted.

21. Before advertng to appreciation of the evidence, it is necessary to see relevant provisions.

22. Section 8 of the said Act, deals with offences relating to bribing of a public servant. The said Section is reproduced, as under:

“8. Offence relating to bribing of a public servant. (1) Any person who gives or promises to give an undue advantage to another person or persons, with intention-

(i) to induce a public servant to perform improperly a public duty; or

(ii) to reward such public servant for the improper performance of public duty;

shall be punishable with imprisonment for a term which may extend to seven years or with fine or with both: Provided that the provisions of this section shall not apply where a person is compelled to give such undue advantage:

Provided further that the person so compelled shall report the matter to the law enforcement authority or

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investigating agency within a period of seven days from the date of giving such undue advantage:

Provided also that when the offence under this section has been committed by commercial organization, such commercial organization shall be punishable with fine.

Illustration. - A person, 'P' gives a public servant, 'S' an amount of ten thousand rupees to ensure that he is granted a license, over all the other bidders. 'P' is guilty of an offence under this sub-section.

Explanation. - It shall be immaterial whether the person to whom an undue advantage is given or promised to be given is the same person as the person who is to perform, or has performed, the public duty concerned, and, it shall also be immaterial whether such undue advantage is given or promised to be given by the person directly or through a third party.

(2) Nothing in sub-section (1) shall apply to a person, if that person, after informing a law enforcement authority or investigating agency, gives or promises to give any undue advantage to another person in order to assist such law enforcement authority or investigating agency in its investigation of the offence alleged against the later.”

23. Thus, Section 8 of the said Act is applied to persons who gives or promises to give an undue advantage to another person or persons intentionally to induce a public servant to perform a public duty improperly or to reward such public servant for improper performance of public duty.

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24. In the present case, the allegation is that it was the accused, who was serving as public servant and discharging his duties as public servant, who demanded the gratification amount and accepted the same.

25. Section 7 of the said Act, deals with offence relating to public servant being bribed. The said Section is reproduced, as under:

7. Offence relating to public servant being bribed. - Any public servant who, -

-(a) obtains or accepts or attempts to obtain from any person, an undue advantage, with the intention to perform or cause performance of public duty improperly or dishonestly or to forbear or cause forbearance to perform such duty either by himself or by another public servant; or

(b) obtains or accepts or attempts to obtain, an undue advantage from any person as a reward for the improper or dishonest performance of a public duty or for forbearing to perform such duty either by himself or another public servant; or

(c) performs or induces another public servant to perform improperly or dishonestly a public duty or to forbear performance of such duty in anticipation of or in consequence of accepting an undue advantage from any person,

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shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

Explanation 1. - For the purpose of this section, the obtaining, accepting, or the attempting to obtain an undue advantage shall itself constitute an offence even if the performance of a public duty by public servant, is not or has not been improper.

Illustration. - A public servant, 'S' asks a person, 'P' to give him an amount of five thousand rupees to process his routine ration card application on time. 'S' is guilty of an offence under this section.

Explanation 2. - For the purpose of this section,-

(i) the expressions "obtains" or "accepts" or "attempts to obtain" shall cover cases where a person being a public servant, obtains or "accepts" or attempts to obtain, any undue advantage for himself or for another person, by abusing his position as a public servant or by using his personal influence over another public servant; or by any other corrupt or illegal means;

(ii) it shall be immaterial whether such person being a public servant obtains or accepts, or attempts to obtain the undue advantage directly or through a third party.”

26. Section 13 of the said Act, deals with criminal misconduct by a public servant. The said Section is reproduced, as under:

“13. Criminal misconduct by a public servant. - [(1) A public servant is said to commit the offence of criminal misconduct,-

(a) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or any property under his control as a public servant or allows any other person so to do; or

(b) if he intentionally enriches himself illicitly during the period of his office.

Explanation 1. - A person shall be presumed to have intentionally enriched himself illicitly if he or any person on his behalf, is in possession of or has, at any time during the period of his office, been in possession of pecuniary resources or property disproportionate to his known sources of income which the public servant cannot satisfactorily account for.

Explanation 2. - The expression "known sources of income" means income received from any lawful sources.]

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine.”

27. In view of Section 13(1)(d)(i), if a public servant by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (iii) while holding office as a public servant, obtains for any valuable thing or pecuniary advantage without any public

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interest; or (e) and if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession of amount for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income, he is said to have committed an offence under Section 13(1)(d) read with 13(2) of the said Act.

28. After going through the entire evidence, the entire case revolves around story that PW1 complainant Mohd.Akram Mehmood Ahmad was prosecuted of the offence under Section 304 of the Indian Penal Code and the case was pending against him. The accused was working as Junior Clerk in the court of learned Ad-hoc District Judge, Court No.8, Nagpur whereat the case of the complainant was pending. The evidence shows that the accused demanded the amount from the complainant on an assurance that on payment of the amount, the complainant would be acquitted as he would manage the Presiding Officer. In pursuance of the said demand, he called the complainant at Joshi Juice Centre on 20.3.2009 and accepted the amount in presence

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of PW2 shadow pancha Mangesh Deshmukh. The demand and acceptance is also established by the prosecution on the basis of circumstantial evidence. The communication between the complainant and the accused through telephonic call is proved by PW3 Trap Officer Rajesh Duddalwar by producing CDRs Exhibits- 94 and 95. The Mobile Number of the complainant was 9423403527 and mobile number of the accused was 9850976567. The CDRs show that the accused made a telephonic call on the day of the trap to the complainant as per CDRs. The accused was subscriber of Idea Mobile Company, is also established.

29. Thus, circumstantial evidence on record shows that the evidence as to the demand is corroborated by CDRs. The circumstantial evidence is that the tainted amount is recovered from the accused and the fingers of the right hand of the accused were dipped into the solution of phenolphthalein powder and sodium carbonate as well as the handkerchief of the accused. The fingers of the complainant were also dipped in the said solution. All three bottles were forwarded to analysis. The Analysis Report

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Exhibit-79 shows phenolphthalein powder and sodium carbonate are detected at Exhibits-1, 2 and 3.

30. Thus, the evidence adduced by the prosecution consistently shows that it was the accused who demanded the amount and accepted the same on 20.3.2009.

31. In the light of the judgment of the Constitution Bench of the Honourable Apex Court for recording conviction, the prosecution has to prove demand and acceptance of illegal gratification either by direct evidence, which can be in the nature of oral or documentary, or by circumstantial in the absence of direct or oral evidence. A prior demand by public servant when accepted by bribe giver and in turn and there is a payment made which is received by the public servant would be an offence of obtainment under Section 13(1)(d)(i) and (ii) of the said Act. As observed earlier, proof of demand of bribe by a public servant and its acceptance by him is *sine qua non* for establishing offence under Section 7 of the said Act.

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32. The evidence, in the present case, consistently shows that there was a demand and in pursuance of the said demand, there was an acceptance.

33. Though the investigation carried out by PW3 Trap Officer Rajesh Duddalwar shows that the accused was discharging his duty as public servant as he was serving as Junior Clerk on the establishment of the District Court at Nagpur, the accused obtained and accepted an undue advantage with an intention to perform or cause performance of public duty improperly or dishonestly and thereby committed an offence under Section 7 and 13(1)(d) read with Section 13(2) of the said Act, but the Investigating Officer has filed chargesheet by applying Section 8 of the said Act, which relates to the bribe giver and not relates to taker. The entire investigation papers nowhere show that the accused was a bribe giver. However, the investigation is carried out and chargesheet is filed by the Investigating Officer by applying wrong provisions.

34. It is well settled that defective investigation is not sufficient to acquit accused. If defective investigation of the

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prosecution is visible or can be pursued, the courts have to deal with the same with an iron hand appropriately within the framework of law. It is duty of the prosecutor also to ensure that the proper charge is framed and proper trial is conducted.

35. In the present case, not only the chargesheet is filed by invoking Section 8 of the said Act but also the charge is framed under the same Section and the trial is conducted on the framed charge.

36. Section 228 of the Code of Criminal Procedure, deals with framing of charge, which reads as under:

“228. Framing of charge. - (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which —

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

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(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of Sub-Section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

37. The purpose of framing a charge is to intimate to the accused the clear, unambiguous and precise nature of accusation that the accused is called upon to meet in the course of a trial. The case may be a sessions case, a warrant case, or a summons case, the point is that a prima facie case must be made out before a charge can be framed. At the stage of framing charge in accordance with principles which have been laid down by the Honourable Apex Court in catena of decisions including in the case of **Ghulam Hassan Beigh vs. Mohammad Maqbool Magrey and ors**², what the Court is expected to do is, it does not act as a mere post office. The Court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by the prosecution. The sifting is not to be meticulous in the sense that the Court dons the mantle of the Trial Judge hearing arguments after the entire evidence has been

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adduced after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is, the Court must be satisfied that with the materials available, a case is made out for the accused to stand trial.

38. The correct framing of the charge is of considerable importance as it enables the prosecution to know precisely what facts they have to prove and also gives notice to the accused of the case, which he has to meet. Judges and Magistrates should devote their personal attention to this matter and see that the charges are framed correctly and give all the necessary particulars as prescribed in section 211 to 213 and 218 to 221(1) of the Code of Criminal Procedure. The said aspect is again considered by the Honourable Apex Court in the case of **Kalicharan and ors vs. State of Uttar Pradesh**³ wherein it is held that the case can be remanded for framing of proper charge and for recording additional evidence.

39. Primary consideration, at the stage of framing of charge, is to test existence of *prima facie* case and at this stage, probative value of materials on record need not be gone into the nature of evaluation to be made by the court at the stage of framing of charge, at the stage of framing of charge, the court has to form a presumptive opinion to the existence of factual ingredients constituting the offence alleged and it is not expected to go deep into probative value of the material on record and to check whether the material on record would certainly lead to conviction at the conclusion of trial.

40. Thus, in the present case, the charge framed against the accused is, as under:

“1. That during the month of March, 2009, you accused Sanjay s/o Wasudeo Chintmalatpure was working as Jr.Clerk in the Adhoc Court-8, Nagpur and as such you are public servant within the meaning of Sec.2(c) of Prevention Of Corruption Act, 1988.

2. That you accused being a public servant demanded Rs.35,000/- for yourself from the complainant Mohd.Akram s/o Mehmood Ahmad and again on 19.3.03 agreed to accept Rs.10,000/- from him instead of Rs.25,000/- and on 20.3.09 you accused accepted Rs.10,000/- from complainant as gratification and other

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then legal remuneration as motive or rewards for inducing by corrupt and illegal mean to Adhoc Judge-8, Nagpur to acquit the complainant in Session trial 'State vrs Mohd. Akram' for the offence punishable u/s.306 of I.P.C. and thereby committed an offence punishable under Section 8 of the Prevention of Corruption Act and within my cognizance."

Thus, ingredients of Sections 7 and 13(1)(d) of the said Act are reflected from the said charge.

41. The Constitution Bench of the Honourable Apex Court, in the case of **Willie (William) Slaney vs. The State of Madhya Pradesh**⁴, has held that the Code of Criminal Procedure is a Code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair

4 1955 SCC OnLine SC 34

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opportunity of defending himself, then, provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure, mere in consequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based.

It has further been observed that, now it is obvious that the question of curing an irregularity can only arise when one or more of the express provisions of the Code is violated. The question in such cases is whether the departure is so violent as to strike at the root of the trial and make it no trial at all or is of a less vital character. It is impossible to lay down any hard and fast rule but taken by and large the question usually narrows down to one of prejudice.

While determining, whether prejudice is caused to the accused, the Honourable Apex Court further held that it is for the Court in all these cases to determine whether there has been prejudice to the accused; and in doing so to bear in mind that

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some violations are so obviously opposed to natural justice and the true intendment of the Code that on the face of them and without anything else they must be struck, down, while in other cases a closer examination of all the circumstances will be called for in order to discover whether the accused has been prejudiced.

It is further held that there is no doubt that a charge forms the foundation of a sessions trial and is a most important step in it. The accused must know and understand what he is being tried for and must be told in clear and unambiguous terms. There can be no shirking that or slurring over it, and this must appear on the face of the record. It cannot be established by evidence taken after the trial. But there is, in our opinion, equally no doubt that the Code expressly deals with this and expressly provides that no error, omission or irregularity in the charge, or even total absence of a charge, shall vitiate a trial unless prejudice to the accused is shown. It is clear to us that the object of the charge is not to introduce a provision that goes to the root of jurisdiction as, for example, the requirement of previous sanction under Section 197, but to enable the accused to have a clear idea of what he is being

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tried for and of the essential facts that he has to meet. But there are other ways of conveying this information.

The Honourable Apex Court, while dealing with Sections 226 and 227 of the Code, held that errors in a charge, and even the total absence of a charge, do not vitiate a trial from the start so as to render it no trial at all as would the absence of sanction under Section 197 of the Code. It has further been observed that no error or omission in the charge, and not even a total absence of a charge, cuts at the root of the trial. It follows that errors in the charge, and even a total absence of a charge, are not placed in the non-curable class.

The Honourable Apex Court opined that the cases contemplated by Section 237 are just as much a departure from Section 233. The first condition is that there shall be a separate charge for each offence and the second is that each charge must be tried separately.

42. Thus, Section 215 of the Code deals with effect of errors relating to charge and omission to frame charge as well as

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irregularities, errors and omission in the charge that do not vitiate or invalidate conviction unless there is prejudice. The said Section lays down that when effect of errors in particulars required to be stated in charge can be treated as material.

43. Section 464 of the Code of Criminal Procedure, deals with error or omission made while framing charges on the finding and sentence of the competent court. The said Section provides that finding and sentence of the court cannot be invalidated merely on the ground of error in framing charge or omission in framing charge. The finding and sentence will be invalidated only if in opinion of court of appeal, the error or omission has occasioned a failure of justice. The said Section reproduced, as under, for reference:

464. Effect of omission to frame, or absence of, or error in, charge.--

(1) No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charge, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

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(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may,-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

44. The aforesaid section is in mandatory terms and it specifically provides what is to be done in cases where charge is not framed or there is an error, omission or irregularity in framing of the charge. From the unequivocal terms of the section, it can be stated that finding, sentence or order could be set aside only in those cases where the facts are such that no valid charge could be preferred against the accused in respect of the facts proved. Secondly, if the facts are such that charge could be framed and yet it is not framed but there is no failure of justice, has in fact been occasioned thereby, the finding sentence or order of the court of

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competent jurisdiction is not to be set aside on that ground. Thirdly, if there is failure of justice occasioned by not framing of the charge or in case an error, omission or irregularity in charge re-trial of the case is to be directed as provided under sub-section (2).

45. Section 386 of the Code of Criminal Procedure, deals with power of the appellate court in dealing with appeals and power to direct retrials.

46. The Honourable Apex Court in the case **Issac alias Kishore vs. Ronald Cheriyan and ors**⁵ has dealt with when powers can be exercised and observed that under Section 386(a) and (b)(i), the power to direct retrial has been conferred upon the Appellate Court when it deals either with an appeal against judgment of conviction or an appeal against acquittal (High Court). There is a difference between the powers of an Appellate Court under Clauses (a) and (b). Under Clause (b), the Court is required to touch the finding and sentence, but under Clause (a), the Court may reverse the order of acquittal and direct that further enquiry

5 (2018)2 SCC 278

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be made or the accused may be retried or may find him guilty and pass sentence on him according to law. Normally, retrial should not be ordered when there is some infirmity rendering the trial defective. A retrial may be ordered when the original trial has not been conducted satisfactorily for particular reasons like, appropriate charge not framed, evidence wrongly rejected which could have been admitted or evidence admitted which could have been rejected etc. Retrial cannot be ordered when there is a mere irregularity or where it does not cause any prejudice, the Appellate Court may not direct retrial. The power to order retrial should be exercised only in exceptional cases.

47. A Three Judges Bench decision of the Honourable Apex Court in the case of **Mohd. Hussain @ Julfikar Ali vs. The State (Govt. of NCT) Delhi**⁶, while dealing with powers of the appellate court to order a retrial under Section 386(b) of the Code of Criminal Procedure, held that the appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such

⁶ (2012)9 SCC 408 Delhi

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power exists, it should not be exercised in a routine manner. A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.

The similar position was adopted by the Honourable Apex Court in the case of **Ajay Kumar Ghoshal vs. State of Bihar**⁷.

⁷ (2017)12 SCC 699

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48. In the light of the above well settled legal provision, it is required to see whether retrial can be directed in the present case.

49. Learned counsel for the accused vehemently submitted that retrial cannot be ordered as it would not suffice the purpose as sanction is required to prosecute the accused under Sections 7 and 13(1)(d) read with 13(2) of the said Act. Section 19 of the said Act, states that no court shall take cognizance of an offence punishable under Sections 7, 11, 13, and 15 alleged to have been committed by a public servant, except with previous sanction. As the chargesheet was filed under Section 8 of the said Act, sanction was not obtained by the trap officer and in absence of the sanction, the court cannot take cognizance and, therefore, such retrial under Section 386(b) cannot be directed. In support of his submissions, he placed reliance on the decision of the Honourable Apex Court in the case of **Nasib Singh vs. State of Punjab and anr⁸**.

50. There is no dispute as to fact that the Investigating Officer has filed chargesheet by applying Section 8 of the said Act. At the

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time of the trial, the court has also framed the charge, the trial is conducted, and the accused is convicted under the said Section.

51. As observed earlier, from the evidence, as well as from investigation papers, it reveals that the accused was discharging his duties as public servant, he demanded gratification, and in pursuance of the said demand, he accepted the amount and, therefore, his act would come under Sections 7 and 13(1)(d) read with 13(2) of the said Act.

52. The cross examination of witnesses is carried out by the defence as if the accused is tried for offences punishable under Sections 7 and 13(1)(d) read with 13(2) of the said Act. The accused never pleaded or contended that some prejudice is caused to him due to incorrect charge. The contents of the charge levelled against the accused show that he being a public servant demanded Rs.35,000/- for himself from the complainant and on 19.3.2003 agreed to accept Rs.10,000/- from him instead of Rs.25,000/- and on 20.3.2009 the accused accepted Rs.10,000/- from the complainant as gratification and other than legal remuneration as motive or rewards for inducing by correct and

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illegal mean to Adhoc Judge-8, Nagpur to acquit the complainant in Session trial 'State vrs Mohd. Akram' for the offence under Section 304 of the Indian Penal Code. Thus, the charge nowhere shows ingredients of Section 8 of the said Act, but it shows ingredients covering under Sections 7 and 13(1)(d) read with 13(2) of the said Act. Neither before the trial court nor before this court, issue as to prejudice was raised, while arguing the appeal. The entire investigation papers disclose offence against the accused under Sections 7 and 13(1)(d) read with Section 13(2) of the said Act and cognizance was taken in absence of sanction. In view of Section 19 of the said Act, the court cannot take cognizance in absence of sanction. At the stage of taking cognizance, learned Judge of the trial court ought to have considered a fact that recital of the report and the entire investigation papers show offence under Sections 7 and 13(1)(d) read with 13(2) of the said Act for which a sanction is required. Learned Judge below ought not to have taken cognizance for want of sanction and an opportunity was required to be given to the State to obtain sanction before taking cognizance. However,

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learned Judge below framed charge and the trial was conducted on the said charge wherein incorrect provision is quoted.

53. The Constitution Bench of the Honourable Apex Court, in the case of **Baijnath Prasad Tripathi vs. The State of Bhopal and anr**⁹, has dealt with the issue regarding trial without sanction and held that trial without sanction is *null and void* being by court not competent. It is observed that where required sanction under Section 6 of the said Act for the prosecution is not obtained, the whole trial is *null and void* and nor it cannot be said that there was any conviction or acquittal in force within the meaning of Section 403(1) of the Code. Such a trial does not bar a subsequent trial of the accused under the said Act read with Section 161 of the Indian Penal Code after obtaining proper sanction. It is further held that the earlier proceeding being *null and void*, the accused cannot be said to have been prosecuted and punished for the same offence more than once. Article 20(2) of the Constitution of India has no application.

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While dealing with this issue, it is further observed that it is under this Section that sanction was necessary for the prosecution of the petitioners. Clause (2) of Article 20 of the Constitution, on which the petitioners rely, states that no person shall be prosecuted and punished for the same offence more than once. Section 403(1) of the Code, on which learned counsel for the petitioners has placed the greatest reliance, is in these terms that a person who has once been tried by a Court of competent jurisdiction for all offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under Section 237.

The Honourable Apex Court, by referring the decision of the Privy Council in the case of in **Yusofalli Mulla vs. The King**¹⁰, has held that whole basis of Section 403(1) was that the first trial should have been before a Court competent to hear and determine the case and to record a verdict of conviction or acquittal; if the

¹⁰ AIR 1949 PC 264

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Court was not so competent, as for example where the required sanction for the prosecution was not obtained, it was irrelevant that it was competent to try other cases of the same class or indeed the case against the particular accused in different circumstances, for example if a sanction had been obtained. So is the decision of this Court where the following observations were made with regard to the point in question:

“Section 403, Criminal Procedure Code, applies to cases where the acquittal order has been made by a Court of competent jurisdiction but it does not bar a retrial of the accused in cases where such an order has been made by a court which had no jurisdiction to take cognizance of the case. It is quite apparent on this record that in the absence of a valid sanction the trial of the appellant in the first instance was by: a magistrate who had no jurisdiction to try him.”

In paragraph No.6 of the said decision, it is held by the Honourable Apex Court that it is clear beyond any doubt that clause (2) of Article 20 of the Constitution has no application in these two cases. The petitioners are not being prosecuted and punished for the same offence more than once,, the earlier proceedings having been held to be null and void. With regard to

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Section 403 of the Code, it is enough to state that the petitioners were not tried, in the earlier proceedings, by a Court of competent jurisdiction, nor is there any conviction or acquittal in force within the meaning of Section 403(1) of the Code, to stand as a bar against their trial for the same offences.

In the same paragraph, it is further observed that if no Court can take cognizance of the offences in question without a legal sanction, it is obvious that no Court can be said to be a Court of competent jurisdiction to try those offences and that any trial in the absence of such sanction must be null and void, and the sections of the Code on which learned counsel for the petitioners relied have really no bearing on the matter. Section 530 of the Code is really against the contention of learned counsel, for it states, inter alia, that if any Magistrate not being empowered by law to try all offender, tries him, then the proceedings shall be void.

With these observations, the Honourable Apex Court held that trial without sanciton is null and void being by court not competent. Subsequent trial with proper sanction is not barred.

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54. In the case of **Nanjappa vs. State of Karnataka**¹¹ also, the Honourable Apex Court held that question of validity of an order of sanction under Section 197 of the Code could be raised and considered at any stage of proceedings. Section 19(1) of the Code forbids taking of cognizance by the Court against a public servant except with the previous sanction of an authority competent. In case, sanction is found to be invalid, the court can discharge the accused relegating the parties to a stage where the competent authority may grant a fresh sanction for prosecution in accordance with law.

Thus, perusal of both decisions *supra* reveals that second trial is not forbidden upon obtaining a valid sanction.

55. As observed earlier, there are powers under Section 386(b) of the Code directing retrial. Perusal of the charge levelled against the accused shows that offences made out are under Sections 7 and 13(1)(d) read with 13(2) of the said Act. In view of Section 19 of the said Act, sanction was required and in absence of the sanction, the court cannot take cognizance. As

¹¹ (2015)14 SCC 186

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observed by the Constitution Bench of the Honourable Apex Court, in the case of **Bajnath Prasad Tripathi vs. The State of Bhopal and anr** *supra*, trial without sanction is null and void being by court not competent. Subsequent trial with proper sanction is not barred. The subsequent decision of the Honourable Apex Court also reiterates the ratio and held that In case, sanction is found to be invalid, the court can discharge the accused relegating the parties to a stage where the competent authority may grant a fresh sanction for prosecution in accordance with law.

56. In view of the above, cognizance is taken without a sanction though offences under Sections 7 and 13(1)(d) read with 13(2) reveal the whole trial is *null and void*.

57. It is necessary to keep in mind that rights of an accused to fair trial and due process. However, at the same time, care has to be taken that the people seeking protection of law do not lose hope in the legal system and the interest of the society are not to be overlooked.

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58. The accused is facing corruption charges in the present case. Admittedly, charges of corruption are serious in nature and when it is alleged against a public servant, who agrees to accept gratification amount, while performing his/her public duties, having regard to gravity of allegation levelled against the accused. The accused in the present case was serving as ministerial staff of the court. The integrity of court's staff is utmost important as public at large is looking to this institution with the highest expectation. Acquittal of the accused on this ground would give wrong signal to the society. If the evidence adduced is perused meticulously, it shows involvement of the accused. It is necessary to grant a liberty to the prosecution to approach the competent authority to obtain sanction by following due process of law. As observed by the Honourable Apex Court in the case of **Nanjappa vs. State of Karnataka**¹², second trial is not forbidden upon obtaining a valid sanction.

59. In present case, as such, such liberty can be granted to the prosecution.

12 AIR 2015 SC 3060

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60. As observed earlier, that cognizance is taken without a sanction though offences under Sections 7 and 13(1)(d) read with 13(2) reveal the whole trial is *null and void*, such a trial does not bar a subsequent trial of the accused under the said Act read with Section 161 of the Indian Penal Code after obtaining a proper sanction. The issue is settled by the Honourable Apex Court in the cases of **Bajjnath Prasad Tripathi vs. The State of Bhopal and anr** *supra* and **Nanjappa vs. State of Karnataka** *supra* stating that a second trial is not forbidden upon obtaining a valid sanction.

61. In this view of the matter, the conviction of the accused is to be set aside and quashed relegating the parties to a stage where the competent authority may grant a fresh sanction for prosecution in accordance with law as the second trial is not forbidden upon obtaining a valid sanction in the light of the decision of the Honourable Apex Court. As such, following order is passed.

ORDER

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

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(2) The judgment and order of conviction and sentence dated 26.10.2016 passed by learned Special Judge, Special Court for ACB, Nagpur in Special (ACB) Case No.04/2010 is hereby quashed and set aside.

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

(4) The parties are relegated to a stage where the competent authority may grant a fresh sanction for prosecution in accordance with law.

(5) The prosecution is at liberty to approach a competent authority seeking sanction by following due process of law.

(6) Copy of this judgment be forwarded to the Director of Prosecution.

The appeal stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!

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