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RAJESH GUPTA

v.

STATE THROUGH CENTRAL BUREAU OF INVESTIGATION

(Criminal Appeal No.1769 of 2014)

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MARCH 29, 2022

[VINEET SARAN AND J. K. MAHESHWARI, JJ.]

C *Prevention of Corruption Act, 1988: s.7 – For an offence under s.7, the demand of illegal gratification is a sine qua non to prove the guilt – Mere recovery of currency notes cannot constitute an offence under s.7 unless it is proved beyond reasonable doubt that accused voluntarily accepted the money, knowing it to be a bribe – The proof of acceptance of illegal gratification can follow only if there is proof of demand – In the instant case there are no sufficient evidence available which points towards such demand*
D *except of the evidence of the complainant whose sole testimony cannot be relied upon without having corroboration with the independent witness as she being interested witness.*

E *Prevention of Corruption Act, 1988: s.20 – Presumption – When Applicable – The presumption under s.20 can be drawn only when the demand is proved and the money is voluntarily accepted, knowing the fact that the said money has been delivered by way of bribe – In absence of proof of demand for illegal gratification and mere possession or recovery of the currency notes is not sufficient to constitute such offence – Presumption under s.20 can be drawn*
F *only after demand and acceptance of illegal gratification is proved beyond reasonable doubt – In absence of proving the recovery from the person or the drawer of the table or acceptance of the currency notes by accused with relevant material on record in furtherance to the proved demand, the guilt cannot be proved – In the case at hand, the currency notes were found on the table underneath dak*
G *pad towards the visitors side – It is merely alleged that the said currency notes were wrapped in a note-sheet on which the traces of the finger prints of the appellant were found, which is treated as acceptance by the appellant – Merely the note sheet, in which the money was wrapped, on dipping in the Sodium Carbonate solution*
H *turned pink, traces of which were found in CFSL report, is not*

sufficient to prove the guilt of the appellant, in particular, when the currency notes laced with phenolphthalein powder were found towards the visitors side on the table and not recovered from the person or drawer of his table and the solution in which the hands of appellant were dipped, did not turn pink – In the facts and circumstances of the case, the evidence so brought is not cogent and sufficient to prove the acceptance of bribe by the accused/ appellant – The findings as recorded by the trial court and the High Court, drawing presumption under s.20 are completely perverse in law as there is no evidence to prove the demand and the acceptance and therefore the theory of preponderance of probabilities, is not sustainable.

Evidence Act, 1872: Tape recorded statement – Evidentiary value of – Discussed.

Ram Singh v. Col. Ram Singh 1985 (Suppl) SCC 611 : [1985] Suppl. SCR 399; Panna Damodar Rathie v. State of Maharashtra (1979) 4 SCC 526; Ayyasami v. State of Tamil Nadu (1992) 1 SCC 304; Meena (Smt) w/o Balwant Hemke v. State of Maharashtra (2000) 5 SCC 21 : [2000] 3 SCR 12; B. Jayaraj v. State of Andhra Pradesh (2014) 13 SCC 55 : [2014] 4 SCR 554; C.M. Girish Babu v. CBI (2009) 3 SCC 779 : [2009] 2 SCR 1021 – relied on.

Case Law Reference

[1985] Suppl. SCR 399	relied on	Para 12	
(1979) 4 SCC 526	relied on	Para 16	
(1992) 1 SCC 304	relied on	Para 16	
[2000] 3 SCR 12	relied on	Para 19	
[2014] 4 SCR 554	relied on	Para 20	

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1769 of 2014.

From the Judgment and Order dated 25.03.2014 of the High Court of Delhi at New Delhi in CrI. A. No.89 of 2009.

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A V. Giri, Sr. Adv., Mehul M. Gupta, Ms. Ranjeeta Rohatgi, Ms. Samten Doma, Shrirang Varma, Ms. Pragya Bhagel, Advs. for the Appellant.

Ms. Aishwarya Bhati, ASG, Ms. Arunima Dwivedi, Mohd. Akhi, Sughosh Subramanyam, Amit Sharma, Raghav Sharma, Ms. Poornima Singh, Manvendra Bhati, Arvind Kumar Sharma, Advs. for the Respondent.

The following Order of the Court was passed:

ORDER

C 1. This appeal has been filed questioning the validity of the judgment passed on 25.3.2014 in Criminal Appeal No. 89 of 2009 by the High Court of Delhi confirming the judgment dated 24.1.2009 passed by Special Judge, Central District-02, Delhi in C.C. No. 195 of 2001 convicting the appellant for the offences under Sections 7 & 13 (2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (for short “PC Act”) and the order of sentence dated 27.1.2009 whereby for the offence under Section 7 of PC Act, the appellant was sentenced to 2 years rigorous imprisonment with a fine of Rs. 15,000/- and in default, further simple imprisonment for 30 days and for the offence under Section 13(2) read with Section 13(1)(d) of PC Act, rigorous imprisonment for 2½ years and fine of Rs. 15,000/-, in default, simple imprisonment for 30 days. Both the sentences were directed to run concurrently.

F 2. The appellant is an accused in a corruption case under the PC Act. As per prosecution allegations, the appellant, who was the Assistant Commissioner of Income Tax, Circle 20(1) at the concerned point of time demanded and accepted the bribe of Rs.15,000/- from the complainant PW-3 Madhu Bala in regard to scrutiny of her case, which was pending with the appellant.

G 3. The Trial Court, vide judgment dated 24.1.2009, concluded that on 7.3.2000, the appellant, while working as public servant (Assistant Commissioner of Income Tax, Circle 20(1)), demanded bribe from the complainant PW3- Madhu Bala and in pursuance of his demand, accepted bribe/illegal gratification of Rs. 15,000/- from her on 9.3.2000 in his office (cabin/chamber). Thus by corrupt and illegal means, he abused his position as a public servant and obtained pecuniary advantage for himself. The appellant was found guilty for the charge under Sections

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7 & 13(2) read with Section 13(1)(d) of PC Act. The High Court relying upon the testimony of PW3-Madhu Bala, who was able to identify the conversation Exb. P2 (cassette) from the transcript though found inaudible and without proof of non-tampering the same, concluded that the demand was proved. On the point of acceptance, relying upon the version of PW3 Madhu Bala, who was said to put Rs. 15,000/- in a note sheet towards visitors side of the table underneath a dak-pad and in reference to the CFSL report, proved the acceptance of bribe demanded by the appellant. In addition, drawing presumption under Section 20 of PC Act, confirmed the findings of the Trial Court and the sentence so awarded. Aggrieved by the said judgments, this appeal has been filed.

4. We have heard Mr. V. Giri, learned senior counsel for the appellant and Ms. Aishwarya Bhati, learned Additional Solicitor General, appearing for the respondent at length and have perused the record.

5. In a case of corruption under the PC Act, what is essentially required to be proved is demand of money or illegal gratification by the accused, as well as acceptance and recovery of the same from the accused with motive. In the present case, as per the prosecution, the demand by the appellant from the complainant is alleged to be on four occasions. Twice on 07.03.2000 and again twice on 09.03.2000. On the first occasion on 07.03.2000, according to the complainant, the demand is said to have been made by the appellant through the Chartered Accountant namely; Mr. Rajiv Jain, according to whom, the appellant had demanded a sum of Rs.50,000/- for settlement of the case in favour of the complainant. Again on the said date itself, i.e. 07.03.2000, when she visited the office of the appellant along with her employee (Mr. Krishan Kumar), the demand made initially from her was of Rs.75,000/-, which is said to have been reduced to Rs.50,000/-.

6. The complainant then approached Central Bureau of Investigation (CBI) through some high-level connection of her (whose name she did not disclose), and then on 09.03.2000 she visited the office of the CBI and met the concerned Officer (Mr. Awasthi) who, after talking to her, advised her to speak to the appellant on phone with regard to the matter of closing her scrutiny case, for which the alleged demand of money was made by the appellant. The complainant made the call to the appellant and the telephone conversation between the complainant and the appellant accused is said to have been recorded, in which admittedly the offer of money was being made by the complainant to the

A appellant when she said that she would give only Rs.15,000/- to which no acknowledgement or acceptance from the side of the appellant was there, except that the appellant agreed to meet the complainant in his office in the evening at about 04.00 p.m. The said conversation has been produced before the Court as Exb.P-2.

B 7. The second incident on 09.03.2000 is said to be when the complainant went to the office of the appellant at about 04.00 p.m., accompanied by two independent witnesses, being Constable Babita Kapoor, who was not examined and PW5-B.S. Chauhan (shadow witnesses), who were both independent government officers, having been asked by the officials of the CBI to accompany the complainant so that they could be witnesses of the alleged illegal demand and gratification being handed over to the appellant. However, the said two independent shadow witnesses did not go inside the chamber of the appellant when the alleged demand and transaction of money is said to have taken place. It is the case of the prosecution that the complainant had gone there alone inside the chamber of the appellant, which was a shared room in which there was a partition and other officers namely; PW6-N.C. Swain, DCIT and PW10-T. Kipgen, ACIT were also present on the other side of the partitioned room. The complainant had been given a Micro-Cassette Recorder with a Credit-Card Type Transmitter and the shadow witness PW5-B.S. Chauhan was given the ear-piece to the Credit-Card Transmitter to listen and record the conversation between the appellant and the complainant. The said conversations have been produced as Exb. P-1 and P-3. The currency notes, which were to be handed over by the complainant to the appellant, were laced with phenolphthalein powder. The complainant is said to have placed currency notes, totaling Rs.15,000/-, on the visitor side of the office table of the appellant, wrapped in a piece of paper, which was then covered with the dak pad. There is no allegation of the money having been handed over personally to the appellant or kept inside the drawer of his table.

G 8. The complainant is said to have then gone out of the office of the appellant and thereafter the officers of the CBI entered and conducted the trap proceedings. They checked the appellant in person and also the drawers of his office table and his briefcase, but did not find any money, which was later recovered from the visitors side of the table underneath the dak pad, which was only on the indication of complainant after she was called again in chamber. The phenolphthalein test of the appellant

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was conducted by asking the appellant to dip his hands in Sodium Carbonate solution, but the colour of the solution did not change pink. However, still the water which was collected and sent for CFSL examination, and in such examination report, traces of phenolphthalein are said to have been found. While the complainant was in the chamber of the appellant, the conversation was to be recorded by her and also through the Credit Card Transmitter, but she skipped to push the button of recorder, therefore, it could not be recorded. The other two officers namely; PW6-Mr. N.C. Swain, Dy. CIT and PW10-Kipgen, ACIT, who were in the same room with a partition, did not support the allegation of demand and acceptance of bribe by the appellant. It was in these facts that the appellant is said to have been made accused and convicted in the case.

9. As regards the alleged demand at the pre-trap stage, it is said to have been made first time on 07.03.2000 through the Chartered Accountant namely, Mr. Rajiv Jain and second time when complainant visited the office of the appellant on the same date i.e. 7.3.2000 along with her employee, Krishan Kumar. To prove the said two demands on 7.3.2000, neither Rajiv Jain, Chartered Accountant nor Krishan Kumar (employee of the complainant) have been examined in the Court. It is to be observed that before the accused is called upon to explain the foundational fact of demand and acceptance, it must be proved by the prosecution by cogent evidence. The testimony of the complainant, who is an interested or partisan witness with the success of trap, must be tested in the same way as that of any other interested witness. Except the testimony of PW3 Madhu Balal, no other material has been brought on record to prove the said demand. Therefore, in our considered view, pre-trap demand on 7.3.2000 has not been proved by the prosecution, which is a foundational fact of the case. In our view, the finding recorded by the Trial Court to prove the pre-trap demand i.e. on 7.3.2000 is without any evidence on record and based on erratic evaluation, which is mechanically confirmed by the High Court.

10. At pre-trap stage, the third demand, as alleged, was made on 9.3.2000 on the basis of a telephonic conversation recorded in the office of CBI. As per the testimony of PW3-Madhubala, second cassette Exb P-2 is the conversation recorded in the office of CBI. The transcript is in the shape of a statement of complainant under Section 161 Cr.P.C.. The said recording Exb. P2 was inaudible when played in the court

- A during the statement of PW3 Madhu Bala. As per her request, it was re-played, then only PW3 could identify part of the conversation taking clue from the transcript. About some part of the recording in the statement, she said that her car became out of order and she offered about Rs. 15,000/-, but she could not gather other dialogue spoken by the accused, Rajesh Gupta clearly, except to agree for meeting the appellant at 4 P.M. The net conclusion is that the said conversation was inaudible, as has rightly been observed by the High Court in paragraph 48 of the impugned judgment.

11. The argument of the counsel for the appellant has substance that transcript cannot be produced in the form of a statement of the complainant under Section 161 Cr.P.C. because it was a conversation with the accused and cannot be her own version. At the same time, from the evidence brought on record, the said statement in the shape of transcript was of 11.6.2001, whereas the alleged incidence occurred 15 months prior thereto i.e. on 9.3.2000. The accused applied to the Trial Court to supply the transcript of the conversation, if any, prepared in the office of CBI, but at the time of hearing of the said application, the Public Prosecutor made a statement before the Court on 1.4.2002 and said that no transcript was prepared from the audio cassette Exb. P2, hence could not be supplied to the accused by Court, and his application for supply of transcript was disposed of on the basis of the statement made at the Bar by the Public Prosecutor. Had the transcript, if any, been with the prosecution on 11.6.2001, there was no reason for the said statement having been made before the Court. Thus, the said transcript, on the basis of which the clue is taken by the appellant while hearing the inaudible cassette Exb. P2 in the Court, was highly doubtful which, in our view, cannot be relied upon. It is not out of place to observe that conversation of complainant and appellant in the office of CBI was recorded on the aid and advice of Mr. Awasthi and entire set-up for recording was arranged by him, but he was not produced as a witness by prosecution to prove the same.

12. On the issue of evidentiary value and credibility of the recording in the cases of trap, the law is well-settled in the case of **Ram Singh vs. Col. Ram Singh** 1985 (Suppl) SCC 611, wherein this Court held that tape-recorded statement is admissible in evidence if the voice of the speaker is identified by the maker of the record and other persons recognizing his voice. In case, the maker is unable to identify the voice,

strict proof would be required to determine whether or not, the said voice is of alleged speaker. The accuracy of the tape-recorded statement must be proved by the maker of the record by satisfactory evidence, direct or circumstantial. The possibility of tampering with, or erasure of any part of the tape-recorded statement must be totally excluded. The voice of the particular speaker must be clearly audible and must not be lost or distorted by other sounds or disturbances, otherwise, the transcript as prepared, is inadmissible in evidence.

13. In view of the above discussion, it is clear that the pre-trap recording made in the office of CBI and produced as Exb. P2 and stated by PW3 Madhu Bala in her statement with the clue of transcript is not testified with the touchstone of the law laid down in the case of **Ram Singh** (supra). As apparent from the record, the finding recorded by the High Court that the said cassette is inaudible, PW3- Madhu Bala, during playing of the cassette in the court, stated about some of the portion of the recording looking to the transcript. Once the preparation of the transcript itself is in question, as discussed above, clue cannot be taken from the same and the inaudible cassette cannot be relied upon. Therefore, in the opinion of this Court, the pre-trap recording for demand in the office of CBI vide Exb. P2 on 9.3.2000 has not been proved.

14. The shadow witness PW4-Virendra Prasad was present at the time of conversation of the complainant and the appellant on 9.3.2000 in CBI office. In his Court statement, he said that the offer was made by the complainant to the appellant and no demand at the instance of the appellant was made. While, analyzing the testimony of this witness, the Trial Court has rightly observed that from the testimony of PW4, it is clear that no money was demanded by the appellant/accused. The other shadow witness PW5 B.S. Chauhan, who heard about the talk and was present in the office of CBI states that the complainant had given offer of Rs. 50,000/- but there was no positive response showing demand on behalf of the appellant. He said in examination-in-chief that “*aajao dekh lege*”, but in cross-examination, it is specifically stated by him that there was no demand of money from the side of the appellant/accused. After due appreciation of the aforesaid, it is clear that the conversation Exb. P2 is inaudible and not proved. The said conversation which was tried to be explained on the basis of the transcript is inadmissible in evidence and that too in a statement recorded under Section 161 Cr.P.C. of the complainant. The transcript dated 11.6.2001 is doubtful, more so in view

A of the Trial Court order dated 1.4.2002 when it was recorded that there was no transcript available. Thus, in reference to inadmissible transcript, no inference or even the preponderance of probability of demand can be established.

B 15. The fourth demand, as alleged, was on 9.3.2000 in the office of the appellant at the time of trap. In this regard, the complainant was advised to accompany PW5 B.S. Chauhan and lady Constable Babita Kapoor. As per the testimony of PW3 Madhu Bala, it is clear that PW5 B.S. Chauhan and lady Constable Babita Kapoor did not accompany her to the chamber, which initially she said was out of their own will, but
C later she stated that she herself asked them not to accompany her otherwise the accused would not accept the bribe. Therefore, at the time of the trap, it is only the complainant who went inside the chamber of the accused. She went in the chamber along with Micro-Cassette Recorder and a Credit Card Type Transmitter, the ear-piece of which was with PW 5 B.S. Chauhan. As per the testimony of the complainant,
D it is clear that she skipped to start the Micro-Cassette Recorder, which she was having at the time of trap. Therefore, there is no recording of the conversation between the accused and the complainant during trap on 9.3.2000 and its transmission in the Credit Card Transmitter was also not possible. Further the Court has rightly found that both these exhibits
E Exb. P1 & P3 were inaudible as admitted in the statement of PW3 Madhu Bala itself.

16. In view of the above discussion, except for the testimony of PW3 Madhu Bala (complainant), there is no corroborative evidence of demand, either on 7.3.2000 or 9.3.2000. The law is well-settled by the
F judgments of this Court in **Panna Damodar Rathi vs. State of Maharashtra** (1979) 4 SCC 526 and **Ayyasami vs. State of Tamil Nadu** (1992) 1 SCC 304, whereby it has been clarified that the sole testimony of the complainant, who is the interested witness, cannot be relied upon without having corroboration with the independent evidence.

G 17. For an offence under Section 7 of PC Act, the demand of illegal gratification is a *sine qua non* to prove the guilt. Mere recovery of currency notes cannot constitute an offence under Section 7 of PC Act, unless it is proved beyond reasonable doubt that accused voluntarily accepted the money, knowing it to be a bribe. The proof of acceptance of illegal gratification can follow only if there is proof of demand.

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18. In view of the foregoing, there is no iota of evidence by which the demand can be proved. Thus, the conclusion of the Trial Court and the High Court to prove the demand is based on surmises and erratic approach ignoring the legal position as enunciated, which cannot be sustained on the facts of the case.

19. Reverting to the issue of acceptance of demand, it is not out of place to refer the judgment of *Meena (Smt) w/o Balwant Hemke vs. State of Maharashtra* (2000) 5 SCC 21 wherein this Court held that mere recovery of the currency notes and positive result of the phenolphthalein test is not enough in the peculiar circumstances of the case to establish guilt of the appellant. The charge must be proved beyond reasonable doubt. In absence of proving the recovery from the person or the drawer of the table or acceptance of the currency notes by accused with relevant material on record in furtherance to the proved demand, the guilt cannot be proved. In the case at hand, the currency notes were found on the table underneath dak-pad towards the visitors side. According to the prosecution, the currency notes were laced with phenolphthalein powder. As per the testimonies of PW3- Madhu Bala, PW4-Virendra Prasad and PW5-B.S. Chauhan, it is clear that the recovery of currency notes was made after calling PW3-Madhu Bala again in the chamber of the appellant by the trap party and on her indication that the money was lying at that particular place. When the hands of appellants were dipped in the solution of sodium carbonate, the colour did not change into pink. It is merely alleged that the said currency notes were wrapped in a note-sheet on which the traces of the finger prints of the appellant were found, which is treated as acceptance by the appellant. In addition to the aforesaid, the note sheet paper, in which the currency notes were wrapped, on being dipped in the solution of sodium carbonate turned pink. After evaluation of the evidence, it is to be observed, safe seizure of the solution of sodium carbonate has not been brought on record. Merely the note sheet, in which the money was wrapped, on dipping in the Sodium Carbonate solution turned pink, traces of which were found in CFSL report, is not sufficient to prove the guilt of the appellant, in particular, when the currency notes laced with phenolphthalein powder were found towards the visitors side on the table and not recovered from the person or drawer of his table and the solution in which the hands of appellant were dipped, did not turn pink. In the facts and circumstances of the case, in our opinion, the evidence so brought is not

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- A cogent and sufficient to prove the acceptance of bribe by the accused/ appellant.

20. On the said issue, the judgments of this Court in ***B. Jayaraj vs. State of Andhra Pradesh*** (2014) 13 SCC 55 ***C.M. Girish Babu vs. CBI*** (2009) 3 SCC 779 are relevant, whereby this Court has clearly spelt out that the recovery shall follow the proof of demand. The presumption under Section 20 of PC Act can be drawn only when the demand is proved and the money is voluntarily accepted, knowing the fact that the said money has been delivered by way of bribe. In absence of proof of demand for illegal gratification and mere possession or recovery of the currency notes is not sufficient to constitute such offence. It is clarified that presumption under Section 20 PC Act can be drawn only after demand and acceptance of illegal gratification is proved beyond reasonable doubt. In our considered opinion, the findings as recorded by the Trial Court and the High Court, drawing presumption under Section 20 of the PC Act, are completely perverse in law. There is no evidence to prove the demand and the acceptance. The theory of preponderance of probabilities, as applied in this case, is not sustainable and the finding of the High Court is liable to be set-aside.

21. As per the discussion made hereinabove, it is clear that the concurrent findings recorded by the Trial Court, and affirmed by the High Court, are not based on due appreciation of the material brought on record in the right perspective. In fact, it is a case in which no cogent evidence is available to prove the guilt of the accused for an offence under Sections 7 & 13(2) read with Section 13(1)(d) of PC Act. As per discussion made above, in the case at hand, the concurrent findings in the judgments of the Courts below cannot dissuade this Court from interfering in a case like this where the findings of conviction have been recorded merely on conjectures and erratic evaluation of evidence. The Court is always having an obligation of judicial conscience to correct the errors where the same are manifest. In our considered opinion, the judgments of the Courts below suffer from serious infirmities and manifest error. There is no proof of demand at pre-trap stage or during trap. The Courts must not over-look the fundamental principle of ignorance of accused till the charge levelled against the appellant is established beyond reasonable doubt. Therefore, in our view, the conviction of the appellant has not been proved and the evaluation is based on conjectures and erratic evaluation.

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22. As such, we set aside the concurrent judgments of the Trial Court as well as of the High Court and hold the appellant to be not guilty of the charges against him. Consequently, the appeal stands allowed. The appellant is honourably acquitted. A

Devika Gujral
(Assisted by : Mahendra Yadav, LCRA)

Appeal allowed.