A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA NO. 617 of 2010

(In the matter of application under Section 378(4) of the Code of Criminal Procedure, 1973.)

Rebati Ballav Tripathy …. ***Appellant***

-versus-

State of Odisha (G.A. Dept.) …. ***Respondent***

For Appellant : ***Mr. S.K. Mund, Sr. Advocate appearing along with Ms. A.K. Dei, Advocate***

For Respondent : ***Mr. M.S. Rizvi, ASC (Vig.)***

CORAM:

JUSTICE G. SATAPATHY

DATE OF JUDGMENT: 05.02.2024

G. Satapathy, J.

1. This appeal U/S. 374 (2) of the Code of Criminal Procedure, 1973 (In short the 'Code') read with Section 27 of the Prevention of Corruption Act, 1988 (In short the 'Act') by the convict is directed against the judgment passed on 16.12.2010 by the learned Special Judge, Vigilance, Sambalpur in T.R. Case No. 25 of 1998 convicting the appellant for committing an offence punishable U/S.7 of the Act

while acquitting him of the offences U/Ss. 13(2) read with Section 13(1)(d) of the Act and sentencing him to undergo rigorous imprisonment for six months with a fine of Rs.2,000/-, in default whereof, to undergo R.I. for further period of one month.

2. The prosecution case in precise was that on 22.09.1997, at about 7 A.M. when Bijaya Bhengra (informant) of village Shankara had been to the office of the convict, who was then S.I. of Excise, Sundargarh, in connection with an Excise raid conducted in his house on 17.09.1997, but the convict initially demanded bribe of Rs.500/- to close the case, however, the convict subsequently reduced his demand of bribe to Rs.200/-. Finding no way out, on 22.09.1997, Bijay Bhengra lodged an F.I.R. against the convict before the S.P. Vigilance, Sambalpur under Ext.7 for demanding bribe of Rs.200/- and accordingly, the Sambalpur Vigilance P.S. Case No. 40 of 1997 was registered.

On the basis of Ext.7 (F.I.R.) a trap was arranged and P.W.1 Shashanka Sekhar Mohanty was

selected to accompany the informant to the Office of convict to overhear the conversation between the informant & the convict and see the transaction of bribe. Accordingly, PW1 along with others including the informant went to the Office of the convict and the informant and P.W.1 proceeded to the Office of convict and on being demanded by the convict, the informant paid the bribe of Rs.200/- which was accepted by the convict and thereafter P.W.1 relayed the signal to the raiding party and thereafter, P.W.3 Basant Kumar Sahu and other members of raiding party rushed to the spot and caught the convict red handed. The hand wash and pocket wash of the shirt of the convict were taken separately with sodium carbonate solution, which turned into pink and the same were collected separately in bottles duly labeled and sealed. P.W.2 Purna Chandra Pradhan recovered the tainted money and compared its serial number with numbers earlier noted by him which were found tallied. Accordingly, the convict was arrested and

forwarded to the Court for committing offences U/Ss. 13(2) r/w Section 13 (1)(d)/7 of the Act and sanction was obtained to launch prosecution against the convict in the course of investigation and the hand wash and pocket wash kept in separate bottles were sent to laboratory for chemical examination which confirmed the presence of phenolphthalein powder in the solutions in bottles sent. As usual on completion of investigation, charge sheet was submitted against the convict for offences U/Ss. 13(2) read with Section 13(1)(d)/7 of the Act under which cognizance was taken and the convict was put to trial for the aforesaid offences when he denied to plead guilty to the charge.

3. In support of the charge, the prosecution examined altogether three witnesses, proved the documents under Exts.1 to 13 and identified one material object M.O.-I brash seal as against the sole oral evidence of D.W.1 Krushna Charan Mohanty and solitary documentary evidence of Ext.A by the defence in support of its plea of thrusting of money

by the decoy in his shirt pocket. Unfortunately, the informant died before he could be examined in the trial.

4. The plea of the convict in the course of trial was denial simplicitor and false implication with specific plea that on 24.09.1997, the informant forcibly thrust some G.C. notes into his pocket and thereby, he shouted and threw away the said G.C. notes, but the Vigilance people caught him and then one Kurshna Charan Mohanty was also present there and was taking bath.

5. After appreciating the evidence on record upon hearing the parties, the learned Special Judge, Vigilance, Sambalpur finding the accused to have accepted the bribe convicted the appellant by relying upon the evidence on record and invoking the presumption U/S 20 of the Act, but the Special Judge, Vigilance, Sambalpur, however, acquitted the appellant for offences U/Ss. 13(2) r/w Section 13(1)(d) of the Act for want of evidence with regard to the demand of bribe by the convict-appellant.

6. Mr. S.K. Mund, learned Senior Counsel appearing along with Ms. A.K. Dei, learned counsel for the appellant has submitted that although the learned trial Court has acquitted the convict-appellant for offences U/Ss. 13(2) r/w Section 13(1)(d) of the Act which is essentially the offence for demand of bribe, but ignoring the failure of prosecution to prove the demand of bribe by the appellant, the Special Judge, Vigilance, Sambalpur erroneously convicted the appellant for offence U/S.7 of the P.C. Act, which is unsustainable in the eye of law since the demand and acceptance are the principal ingredients of the offence and mere acceptance of bribe without any demand would not by itself establish the offence U/S. 7 of the Act. It is further submitted that when the demand is not established, invoking the presumption one under the Section 20 of the Act is clearly impermissible in law, but the learned trial Court had erroneously invoked the said presumption. Mr. Mund has accordingly, prayed to allow the appeal to acquit the appellant of

the charge by setting aside the impugned judgment of conviction and order of sentence by relying upon the decisions in ***(i) K. Santhamma v. State of Telangana: AIR 2022 SC 1134, (ii) Neeraj Dutta v. State (Government of NCT of Delhi): 2023 4SCC 731, (iii) V. Venkata Subbarao v. State, represented by Inspector of Police, A.P.: (2007) AIR (SC) 489***.

On the other hand, Mr. M.S. Rizvi, learned ASC (Vig.), however, while supporting the impugned judgment of conviction has submitted that since acceptance of bribe by the appellant was proved beyond all reasonable doubt by unimpeachable evidence of the prosecution witnesses, the conviction of the appellant for offence U/S.7 of the Act cannot be questioned, since the same is legally permissible. Accordingly, Mr. M.S. Rizvi, learned ASC (Vig.) has prayed to dismiss the appeal.

7. After having bestowed a careful and anxious consideration to the impugned judgment of conviction together with evidence on record keeping

in view the rival submissions, it admittedly appears that the learned trial Court having not found any direct evidence of demand of illegal gratification by the appellant has acquitted him of the charge for offences U/Ss. 13(2) r/w Section 13(1)(d) of the Act, but however, it has found the appellant to have failed to rebut the legal presumption as available U/S 20 of the Act for accepting bribe of Rs.200/- as an illegal gratification from the complainant and thereby, proceeded to convict the appellant for offence U/S 7 of the P.C. Act. In this case, the complainant died before he could be examined for the prosecution, but the accompanying witness namely Shashanka Sekhar Mohanty while being examined as P.W.1 has not wholly supported the prosecution case and he was also declared hostile by the prosecution, but the prosecution by relying upon the evidence of other official witness (PW2) and Trap Laying Officer (PW3) has convicted the appellant for offence U/S 7 of the Act.

8. A conscious reading of the evidence on record in the form of the evidence of all the three witnesses, it is not found as to what transpired between the complainant and the appellant inasmuch as P.W.1 being the accompanying witness, who was supposed to overhear the conversation between the appellant and the complainant and see the transaction of bribe, has only stated to the effect in his evidence that he and the complainant proceeded to the quarter of the accused (appellant) and the complainant entered into the premises of the appellant and he stood on the other side of the road near a cabin and saw the complainant knocking the door and the accused (appellant) came outside and they talked among themselves. It is his specific evidence that the complainant was talking to the accused (appellant) with his back towards him. It is, therefore, very clear that the person who could have seen the transaction between the appellant and the complainant was neither able to see the transaction nor overhear the conversation between them. The

prosecution, therefore, is clearly short of evidence to establish the transaction of bribe and conversation between the appellant and the complainant.

9. On examining the evidence of P.Ws. 2 and 3, only one thing transpire is that the recovery of currency notes from one room of the house of the appellant, but law is very well settled that mere recovery of currency notes dehors demand ipso facto would not be sufficient to constitute the offence U/S 7 of the P.C. Act. Since it has been held in umpteenth times by the Apex Court that the proof of demand and acceptance of bribe is sine-qua-non to establish the offence U/S 7 of the P.C. Act. In ***K. Santhamma vs. State of Telangana; AIR 2022 SC 1134,*** the Hon'ble Apex Court in a similar situation has allowed the appeal by setting aside the judgment of conviction of the appellant therein by quoting the observation made by the Apex Court at paragraph-23 in ***P. Satyanarayana Murthy vs. District Inspector of Police, State of Andhra***

Pradesh and another; (2015) 10 SCC 152 with approval, as under :-

> *"23.The proof of demand of illegal gratification, thus, is the gravamen of the offence U/S. 7 and 13(1)(d)(i) and (ii) of the Act and in absence thereof, unmistakably the charge therefore, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recover thereof, dehors the proof of demand, ipso facto, would thus not sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence Under Section 7 or 13 of the Act would not entail his conviction thereunder."*

10. Moreover, very recently in ***Neeraj Dutta v. State (Government of NCT of Delhi): 2023 4 SCC 731,*** while answering a reference on the point whether in the absence of evidence of complainant/direct or primary evidence of demand of illegal gratification, is it not permissible to draw an inferential deduction of culpability/guilt of public servant U/S 7 and Section 13(1)(d) r/w Section 13(2) of the Act based on other evidence adduced by

the prosecution, a Constitutional Bench of Five Judges of the Apex Court has been pleased to summarize the law on the issue in paragraph-88 of the judgment as under :-

> ***88.*** *What emerges from the aforesaid discussion is summarized as under:*
>
> > ***88.1.*** *(a)* ***Proof of demand and acceptance of illegal gratification by a public servant as a fact in issue by the prosecution is a sine qua non in order to establish the guilt of the accused public servant under Sections 7 and 13(1)(d)(i) and (ii) of the Act.***
> >
> > ***88.2.*** *(b)* ***In order to bring home the guilt of the accused, the prosecution has to first prove the demand of illegal gratification and the subsequent acceptance as a matter of fact. This fact in issue can be proved either by direct evidence which can be in the nature of oral evidence or documentary evidence.***
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> > ***88.3.****(c)* ***Further, the fact in issue, namely the proof of demand and acceptance of illegal gratification can also be proved by circumstantial evidence in the absence of direct oral and documentary evidence.***
> >
> > ***88.4.****(d) In order to prove the fact in issue, namely,* ***the demand and acceptance*** *of illegal gratification by the public servant, the following aspects have to be borne in mind:*
> >
> > > *(i) if there is* ***an offer to pay by the bribe-giver without there being any demand from the public servant*** *and the latter simply accepts the offer and receives the illegal gratification,* ***it is a case of***

***acceptance as per Section 7 of the Act**. In such a case, **there need not be a prior demand by the public servant**.*

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

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

***88.5.** (e) The presumption of fact with regard to the demand and acceptance or obtainment of an illegal gratification may be made by a court of law by way of an inference only when the foundational*

facts have been proved by relevant oral and documentary evidence and not in the absence thereof. On the basis of the material on record, the court has the discretion to raise a presumption of fact while considering whether the fact of demand has been proved by the prosecution or not. Of course, a presumption of fact is subject to rebuttal by the accused and in the absence of rebuttal presumption stands.

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

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

88.8. *(h) We clarify that the presumption in law under Section 20 of the Act is distinct from presumption of fact referred to above in sub-para 88.5(e), above, as the former is a mandatory presumption while the latter is discretionary in nature.*

11. When the admitted evidence on record is tested on the touchstone of the law laid down by the Apex Court in the decision referred to above, there appears no dispute that in order to rebut presumption U/S 20 of the Act, the appellant has admittedly taken a plea that the informant forcibly thrusted money into his shirt pocket and that too, in his house, but the learned trial Court has disbelieved such plea by assigning the reason that the incident of giving money to the appellant must have taken place near the door and the instead of throwing the money to the road, why the accused-appellant threw the same to a place inside his residence-cum-office and again, after throwing the tainted money, immediately he closed the door. There cannot be any cavil of law that the standard of proof required U/S 20 of the P.C. Act is not like the standard of proof to establish the guilt of the accused beyond all reasonable doubt and the standard as required is just like in civil case the "preponderance of probability". The aforesaid plea as taken by the

appellant was also spoken to by P.W.1 in his evidence to the effect that "the accused-appellant told that the complainant forcibly kept money in his pocket and he had thrown the same inside the abandoned store room." Further, from the evidence of P.W.2, it is found that those four Rs. 50 GC notes were found lying in a small open unused room, whereas the evidence of P.W.3 discloses that the tainted money was found from the heap of plastic jerry cans. On the other hand, D.W.1 has stated that the appellant showed the Vigilance people where he had thrown the tainted money. It is, therefore, very clear that the currency notes were not recovered from the personal possession of the appellant, rather it was recovered from the house of the appellant. In the context, the word "accepted" or "obtained" or "agreed to accept" or "attempted to obtain" are emphasized in Section 20 of the P.C. Act for drawing the legal presumption against the accused person as an illegal gratification other than legal remuneration or any valuable thing from any person, but mere

acceptance of money without there being any other evidence would not be sufficient to draw the aforesaid presumption. "Accept" commonly means to take or receive with consent and if a person willingly takes or receives, it would certainly amount to acceptance. On the other hand, "obtain" means to secure or gain as a result of request. The law on the point of drawing the presumption, however, has been set at rest by the Apex Court in paragraph-88 of ***Neeraj Dutta (supra).***

12. The prosecution allegation in this case is that the accused had demanded and accepted the illegal gratification and thereby, the fact in issue involved in this case was demand and acceptance of bribe by the appellant which is sufficiently disclosed from the charge framed against the appellant. The learned trial Court even though has not found any evidence with regard to demand made by the appellant, but it has erroneously convicted the appellant for acceptance of the bribe by misconstruing the provision of Section 20 of the Act inasmuch as the

evidence on record clearly shows that the currency notes were found from the room, but the learned trial Court has erroneously held that there is no possibility of throwing the currency notes in the room, when the transaction took place near the door, which was never spoken to by any of the witness. The sole evidence available for this purpose is the evidence of P.W.1, who had never stated about the transaction to have taken place in front of door, rather his evidence is clear that there was some kind of conversation between the accused and the complainant in front of the door. The law on the point of acceptance is very clear that mere recovery of tainted money divorced from the circumstance under which it were paid is not sufficient to bring home the guilt of the accused person for the charge of accepting the bribe, when the substantive evidence is not reliable. In this case, the learned trial Court has only placed reliance on Section 20 of the Act to convict the appellant, but that too, after considering that the demand was not established by

the prosecution which in the circumstance appears to be unusual and erroneous.

13. In the circumstance and on a conspectus of evidence on record together with the discussion made hereinabove clearly establishes that the prosecution has not been able to prove the demand of illegal gratification made by the appellant and thus, the gravamen of the charge U/S 7 of the Act is found not established against the appellant. Mere acceptance/ recovery of currency notes alleged to be illegal gratification without the proof of demand ipso facto would thus not be sufficient to establish the charge U/S 7 of the Act against the appellant and therefore, the conviction of the appellant in this case appears to be unsustainable in the eye of law.

14. Resultantly, the appeal stands allowed on contest, but no order as to costs. The appellant is acquitted of the charge for offence U/S 7 of the Act. Consequently, the impugned judgment of conviction and order of sentence passed on 16.12.2010 by the

learned Special Judge, Vigilance, Sambalpur in T.R. Case No. 25 of 1998 are hereby set aside.

15. Since the appellant is on bail upon appeal, he is discharged of his bail bonds.

(G. Satapathy)
Judge

Orissa High Court, Cuttack,
Dated the 5th day of February, 2024/S.Sasmal