$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: 21.09.2022***
Pronounced on: 08.12.2022

\+ **CRL.A. 1302/2010**

JOGINDER SINGH MALIK ..... Petitioner

Through: Mr. Sunil K. Mittal, Mr. Vipin K. Mittal, Mr. Kshitij Mittal, Mr. Anshul Mittal, Ms. Aanchal Mittal, Mr. Sachit Arora and Mr. Harshit Vashisht, Advocates.

versus

CBI ..... Respondent

Through: Mr. Rajesh Kumar, SPP with Ms. Mishika Pandita, Advocate

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present Appeal under Section 374 of the Code of Criminal Procedure, 1973 ("Cr.P.C.") has been filed by the appellant for setting aside the impugned judgment dated 08.10.2010, and the order on point of sentence dated 13.10.2010 passed by learned Special Judge, Tis Hazari Courts, Delhi in CC No. 15/2009 whereby the appellant was convicted for offences punishable under Section 7 and 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988, (*hereinafter as "PC Act, 1988"*). The appellant was sentenced to undergo:

i. Rigorous imprisonment for three years along with a fine of Rs. 25,000/- (Rupees twenty five thousand) for the offence punishable under Section 7 of the PC Act, 1988 and in default of payment of fine, to undergo simple imprisonment for three months

ii. Rigorous imprisonment for three years along with a fine of Rs. 25,000/- (Rupees twenty five thousand) for the offence punishable under Section 13(2) read with 13(1)(d) of the PC Act, 1988, and in default of payment of fine, to undergo simple imprisonment for three months.

2. The present appeal was admitted on 10.11.2010 and the sentence of the appellant was suspended by virtue of order dated 21.02.2011.

FACTUAL MATRIX

3. Briefly, the case of the prosecution is that a written complaint dated 09.01.2009 was lodged with S.P. (CBI), CGO Complex, New Delhi by one Sh. Harish Kumar Anand (complainant), against Joginder

Singh Malik (appellant) who was Section Engineer, Delhi Division, Northern Railways at that time, regarding demand of bribe of Rs,15,000/- for making the final bills with respect to three work orders. The complaint was verified on 09.01.2009 and the conversation between the complainant and appellant over mobile and on the sport was recorded in the presence of an independent witness.

4. A team was constituted the next day for laying a trap on the appellant. Complainant produced a sum of Rs. 15,000/- consisting of 30 numbers of GC notes of Rs.500/- denomination each. The numbers of the same were recorded in the handing over memo and other pre-trap formalities such as demonstration regarding reaction of phenolphthalein powder, personal search of complainant, etc. were conducted. The bribe amount of Rs. 15,000/- treated with phenolphthalein powder was kept in the right side pant pocket of complainant and he was directed to hand over the same to the appellant only on his specific demand. A Digital Voice Recorder (DVR) with few blank audio cassettes were arranged for the purpose of recording of possible conversation between the complainant and appellant, and a compact voice recorder was arranged for transferring the recording from the digital voice recorder into regular audio cassettes. Thereafter, formal voices of independent witnesses namely Sh. Amit Khurana and Sh. Sanjay Arora were recorded in digital recorder. Sh. Sanjay Arora was asked to act as a shadow witness and to remain close to the complainant and overhear the conversation and to see the transaction of bribe. Complainant was also directed to give signal to the trap party after the transaction of bribe by rubbing his face with both his hands. A handing over memo

dated 10.01.2009 was prepared in this regard.

5. The CBI trap team reached the Delhi Cantt. Railway Station at around 09:00 hrs. The complainant and shadow witness went to platform no. 4 where the appellant was on duty. The other members of the team took suitable positions in disguise manner at platform no. 4. The complainant contacted the appellant and entered into conversation with him and thereafter both of them entered into a small railway godown adjacent to railway crossing under the Janak Setu. After about five minutes, both of them came out and the complainant flashed the pre-appointed signal and on seeing the same, trap laying officer and other team members rushed towards the said location and immediately caught the right hand and the left hand of the appellant. They disclosed their identities to the appellant and thereafter the appellant was immediately taken inside the said godown, where he managed to free his left hand by force and immediately took out the bribe amount from his left side pant pocket with his left hand and threw the same on the ground. The independent witness namely Sh. Amit Khurana thereafter collected the said tainted bribe amount from the ground. The complainant then narrated the entire sequence, of events and thereafter the colourless solution of sodium carbonate and water was prepared in glass tumbler and on the direction, the appellant dipped his left hand fingers in the said solution, which colourless solution turned pink. The said pink solution was kept in a glass bottle and thereafter the water bottle was sealed. Thereafter wash of the inner lining of the left side pocket of the appellant was also taken in freshly prepared colourless solution of sodium carbonate, which turned pink. The said pink solution

was kept in a glass bottle and thereafter the water bottle was sealed. The recorded conversation was transferred into a separate cassette.

6. The appellant was then arrested for demanding and accepting bribe of Rs.15,000/- from the complainant vide a separate arrest cum personal search memo dated 10.01.2009 at 13:00 hours

7. The appellant appeared before the Trial Court and copies under Section 207 Cr.P.C were supplied to appellant, to his satisfaction. Thereafter, the appellant was charged for offences punishable under Sections 7 & 13(2) read with Section 13(1)(d) of P.C. Act, 1988. Appellant pleaded not guilty to the aforementioned charges and claimed trial.

8. Thereafter, following prosecution witnesses were examined:

i. PW-1 Sh. Mohit Lila, Senior Divisional Engineer-V, Northern Railway, Delhi Division (sanctioning authority)

ii. PW-2 Sh. Govind Ram Yadav, Office Supdt-II, Northern Railway

iii. PW-3 Sh. V.B. Ramtek, Sr. Scienlific Officer, Grade II (Chemistry) CFSL, New Delhi

iv. PW-4 Sh. Pawan Singh, Nodal Officer, IDEA Cellular

v. PW-5 Sh. Ashok Kumar, Addl. Divisional Engineer, Northern Railway

vi. PW-6 Sh. Deepak Kumar Tanwar, Sr. Scienlific Officer, Grade II (Physics) CFSL, New Delhi

vii. PW-7 Sh. Rajesh Kumar Sharma, Senior Clerk, Northern Railway

viii. PW-8 Sh. Harish Kumar Anand, complainant in the present case

ix. PW-9 Sh. Sanjay Arora, shadow witness/independent witness

x. PW-10 Sh. A.K.Rajput, Section Engineer in Indian Railways

xi. PW-11 Inspector Surinder Singh Bhullar, Trap Laying Officer

xii. PW-12 Sh. Amit Kumar, second independent witnesses

xiii. PW-13 Sh. Vikas Kumar Pathak, Investigating Officer of the case

9. Defence evidence was led by the appellant. Statement of appellant under section 313 Cr.P.C. was recorded wherein he has refuted all the evidence produced against him by the prosecution. In his defence, the appellant had examined the following witnesses:

i. DW-1 Sh. Deepak Kanda, Nodal Officer, Airtel

ii. DW-2 Sh. Nagender Pd., Trolly man, Northern Railways

iii. DW-3 Sh. Om Parkash, OS-II under ADEL/ Delhi Sarai Rohilla

iv. DW-4 Sh. Khanoi Ram, Keyman under PWI, Delhi Sarai Rohilla.

v. DW-5 Sh. Vijay Kumar, Carpainter in Indian railways.

10. By way of impugned judgment dated 08.10.2010, the learned Trial Court after considering the evidence and material available on record held the appellant guilty of offences punishable under Sections 7 and 13(2) read with Section 13(1)(d) of PC Act, 1988. The concluding part of the impugned judgment dated 08.10.2010 reads as under:

> *"121. In view of above discussion it is well proved from the evidence produced by the prosecution that accused, who was working as SSE in the Northern Railway , as a public servant, had demanded Rs. 15,000/-from Harish Kumar Anand as illegal gratification on the pretext of preparing his bills and accepted*

the same which was recovered from his possession, thus accused has abused his official position. In these circumstances this court is of opinion that prosecution has proved its case beyond reasonable doubts against accused, hence accused is convicted for the offences punishable U/s 7 & U/s 13(2)r/w 13(1(d)of P.C. Act, 1988..."

SUBMISSIONS BY LEARNED COUNSELS

11. Learned counsel for the appellant submits that the entire prosecution case is inconsistent. The line of arguments advanced by the counsel for respondent, in brief, is as under:

i. That the sanction accorded under section 19 of PC Act, 1988 against the appellant is invalid in the eyes of law. Reliance in this regard has been placed upon the following judgments: ***G.S. Matharaoo v. CBI, 2012 II AD (DELHI) 188, Mohd. Iqbal Ahmed v. State of Andhra Pradesh, AIR 1979 SC 677, State of Karnataka v. Ameer Jan, AIR 2008 SC 108,*** and ***Mahavir Singh v. State, 2014 141 DRJ 149***

ii. That prosecution has failed to bring on record any evidence to prove the demand of bribe on part of appellant before the trap and even on day of trap. Further, even the recovery has not been proved beyond reasonable doubt. Reliance in this regard has been placed upon the following judgments: ***A. Subair v. State of Kerala (2009) 6 SCC 587, Rakesh Kapoor v. State of Himachal Pradesh (2012) 13 SCC 552, M.R. Purushotham v. State of Karnataka (2015) 3 SCC 247, P. Satyanarayana Murthy v. District Inspector of Police, State of Andhra Pradesh (2015) 10 SCC 152,*** and ***Krishan Chander v. State of Delhi (2016) 3 SCC 108***

iii. That the complaint dated 09.01.200 is false, motivated and concocted, and the alleged transaction of bribe pertains to work which is actually outside the scope of work of the appellant. Further, the complainant had the motive to implicate the appellant in a false case. Reliance in this regard has been placed upon the judgment ***Prem Singh Yadav v. CBI 2011 2 JCC 1059***

iv. That there are certain contradictions in the version of the complainant, and that many material witnesses in the present case have not been examined by the prosecution.

v. That there is a grave possibility that the audio recordings have been manipulated. Original Digital Voice Recorder(s), Mini Cassette Player/recorder and the Compact cassette recorder have not seen the light of the day. Even no certificate under section 65(B) of the Indian Evidence Act, 1872 has been placed on record by the prosecution for any of the recordings made by them. Reliance in this regard has been placed upon the following judgments: ***S.K. Saini & Anr. v. CBI 2015 3 JCC 2169, Vishal Chand Jain v. CBI 2011 1 JCC 570, R.K. Pathak v. State (CBI) Crl. A. 567/2000,*** and ***Ashish Kumar Dubey v. State (Thr. CBI) 2014 142 DRJ 396***

12. Learned counsel for the appellant prays that the impugned judgment dated 08.10.2010 and the order on point of sentence dated 13.10.2010 be set aside and appellant be acquitted of all charges.

13. Learned Special Public Prosecutor (SPP) for CBI submits that the impugned judgment does not suffer from any infirmity and the appellant had been rightly convicted in the present case by the learned

Trial Court. The line of arguments advanced by the counsel for respondent, in brief, is as under:

i. That transcription of recorded conversations makes it clear that the appellant had demanded the bribe of Rs.15,000/- from the complainant. Further, the recorded conversation and its transcription have also been corroborated by the evidence of PW-8.

ii. That the appellant accepted Rs.15,000/- voluntarily and consciously which was also recovered from his conscious possession. In this regard, reliance is placed upon the judgment of Hon'ble Supreme Court in ***B. Noha v. State of Kerala, 2006 12 SCC 277***.

iii. That the trap laying officer has fully corroborated the version given by complainant regarding the throwing of money by the appellant on being caught.

iv. Reliance is also placed upon the judgment of Hon'ble Supreme Court in ***CS Krishnamurthy v. State of Karnataka 2005 4 SCC 81*** wherein it was held that in case the sanction speaks for itself then the satisfaction of the sanctioning authority is apparent by reading the order.

v. That the case of prosecution has been fully supported by both the independent witnesses.

ANALYSIS AND FINDINGS

14. The relevant provisions of Prevention of Corruption Act, 1988 (as they stood before the Amendment Act, 2018) are reproduced herein under:

Section 7 of P.C. Act, 1988 provides:

"7. Public servant taking gratification other than legal remuneration in respect of an official act.—Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine."

Section 13 of P.C. Act, 1988 provides:

"13. Criminal misconduct by a public servant.—
(1) A public servant is said to commit the offence of criminal misconduct…….
…(d) if he,—
(i) 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 person any valuable thing or pecuniary advantage without any public interest……
(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."

Section 20 of P.C. Act, 1988 provides:

"20. Presumption where public servant accepts gratification other than legal remuneration.—
(1) Where, in any trial of an offence punishable under section 7 or section 11 or clause (a) or clause (b) of sub-section (1) of section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.
(2) Where in any trial of an offence punishable under section 12 or under clause (b) of section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7, or as the case may be, without consideration or for a consideration which he knows to be inadequate.
(3) Notwithstanding anything contained in sub-sections (1) and (2), the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no interference of corruption may fairly be drawn."

i. Validity of Sanction Order

15. The first issue before this Court is whether the sanction for prosecution accorded against the appellant is valid in law or not. The case of prosecution is that PW-1 Sh. Mohit Lila, sanctioning authority in the present case, was working as Senior Divisional Engineer-V,

Northern Railway, Delhi Division in June 2009 when the sanction for prosecution was sought against the appellant. As per PW-1, by virtue of his post, he was competent to remove the appellant Joginder Singh Malik from his post who was working as Senior Section Engineer (Works), Delhi Division, Northern Railway, Delhi. It is further the case of prosecution that PW-1 had granted the sanction after perusal of the documents and due application of mind, and he also deposed that he had carefully examined the material including statement of witnesses and other documents and after being satisfied that there are sufficient material against appellant Joginder Singh Malik accorded sanction for his prosecution.

16. The learned Trial Court in the impugned judgment has held that PW-1 had applied his mind while preparing the sanction order as the same was deposed by him before the Trial Court. It was further observed that a bare perusal of the sanction order shows that the order is detailed in all respects and was passed after application of mind. The observations of the learned Trial Court are as under:

> *"29. Ld. Defence Counsel argued that sanctioning authority has not applied its mind, he has simply signed the draft sanction order sent by CBI. There is no merit in this argument as the sanctioning authority in this regard has specifically deposed as follows: "In the enclosure I had also received a draft sanction order from CBI. Although draft sanction order was enclosed, I personally gone through all the evidences submitted to me and made myself satisfied regarding adequacy of evidence for according the sanction for prosecution."...*
>
> ***
>
> *33. Our Hon'ble Supreme Court has held that where the sanction order itself is a speaking order in such circumstances it is not necessary to prove it by leading evidence that sanctioning*

authority has applied his due mind. Reliance is placed on C.S. Krishnamurthy Vs. State of Karnataka 2005 IV AD (S.C.) 141 wherein in para No.9 it is observed as follows:

> *"9. Therefore, the ratio is sanction order should speak for itself and in case the facts do not so appear, it should be proved by leading evidence that all the particulars were placed before the sanctioning authority for due application of mind. In case the sanction speaks for itself then the satisfaction of the sanctioning authority is apparent by reading the order. In the present case, the sanction order speaks for itself that the incumbent has to account for the assets disproportionate to his known source of income. That is contained in the sanction order itself. More so, as pointed out, the sanctioning authority has come in the witness box as witness no.40 and has deposed about his application of mind and after going 11 through the report of the Superintendent of Police, CBI and after discussing the matter with his legal department, he accorded sanction. It is not a case that the sanction is lacking in the present case. The view taken by the Additional Sessions Judge is not correct and the view taken by learned Single Judge of the High Court is justified."*

34. In this regard, Hon'ble Supreme Court in Superintendent of police (CBI) Vs. Deepak Chaudhary, 1995 SCC (Crl.) 1095 has held as follows:

> *"We find force in the contention. The grant of sanction is only an administrative function, though it is true that the accused may be saddled with the liability to be prosecuted in a court of law. What is material at that time is that the necessary facts' collected during investigation constituting the offence have to be placed before the sanctioning authority and it has to consider the material. Prima facie, the authority is required to reach the satisfaction that the relevant facts would constitute the offence and then eitb.er grant or refused to grant sanction. The grant of sanction, therefore, being administrative act the need to prove an opportunity of hearing to the accused before according sanction does not arise. The-High Court, therefore, was clearly in error in holding that the*

order of sanction is vitiated by violation of the principles of natural justice."

35. I have carefully gone through the sanction order Ex PWl/A running in four sheets, it is a detailed order having all the material particulars of this case. A bare perusal of this order reflects that sanctioning authority has passed this order after due application of his mind. In view of above discussion, this Court is of opinion that prosecution has proved a valid sanction for the prosecution of accused in this case..."

17. It is submitted by learned counsel for CBI that the aforesaid observations of the Trial Court do not suffer from any infirmity. He has placed reliance upon the judgment in case of ***C.S. Krishnamurthy v. State of Karnataka (supra)*** which also finds mention in Para 33 of the impugned judgment, reproduced hereinabove.

18. Learned counsel for the appellant, on the other hand, has pointed out that PW-1, in examination in chief, stated that he had examined all the statements under Section 161 Cr.P.C. and other materials relevant to this case. However, during his cross examination, he stated that he did not hear the CD prepared by the CBI qua the demand of bribe by accused. It is submitted that it is a matter of record that there is no "CD" prepared in the present case. Clearly, the witness did not even hear the alleged recording that was sought to be proved by the CBI against the appellant herein.

19. It is further submitted by the learned counsel for the appellant that PW-1 has admitted in his cross-examination that he had received a draft sanction order from the CBI and claims that he satisfied himself regarding the sufficiency of evidence against the appellant before appending his signatures on the same. In this regard, certain

inconsistencies and errors have been pointed out by the learned counsel in order to show that the sanctioning authority did not apply its mind properly and signed the Draft Sanction Order in a most mechanical manner. Firstly, it is submitted that the sanction order (Ex. PW-1/A) does not even bear any date on it so as to show when the said sanction order was passed. Secondly, the sanction order refers to an alleged CFSL Report, dated 27.03.2008, which allegedly confirmed the presence of phenolphthalein on the hand washes of the appellant. Interestingly, the alleged incident is dated 10.01.2009 and therefore, it is not possible for any CFSL report to have been there on 27.03.2008, which could pertain to the present case. Thirdly, the allegation against the appellant has been that he demanded bribe for preparing the Final Bills of the complainant, however, a perusal of the sanction order shows that the facts put before PW-1 related to alleged demand of bribe for preparing of Bills and not any Final Bill. It is a matter of common knowledge that in Engineering Contracts, preparation of a Bill and a Final Bill are two distinct processes having different meanings altogether.

20. Learned counsel for the appellant submits that the grant of sanction is a solemn function which, the sanctioning authority is required to perform with due care and due application of mind to the material placed before him/her along with the request for sanction for prosecution, and that sanction for prosecution is not a mere paper formality. Any proceeding/trial initiated on the basis of an improper or illegal sanction order is *void ab initio.*

21. I have gone through the submissions of both the parties as well as

the observations of learned Trial Court in respect of sanction accorded by PW-1 under Section 19 of P.C. Act, 1988 against the appellant.

22. Before moving to the facts of the present case, it will be pertinent to refer to the law laid down by the Courts with regard to sanction under section 19 of P.C. Act, 1988. In ***Mohd. Iqbal Ahmed v. State of Andhra Pradesh (1979) 4 SCC 172***, the Hon'ble Supreme Court has held as under:

> *"3. ...It is incumbent on the prosecution to prove that a valid sanction has been granted by the Sanctioning Authority after it was satisfied that a case for sanction has been made out constituting the offence. This should be done in two ways: either (1) by producing the original sanction which itself contains the facts constituting the offence and the grounds of satisfaction, or (2) by adducing evidence aliunde to show that the facts were placed before the Sanctioning Authority and the satisfaction arrived at by it. Any case instituted without a proper sanction must fail because this being a manifest difficulty in the prosecution, the entire proceedings are rendered void ab initio.....what the Court has to see is whether or not the Sanctioning Authority at the time of giving sanction was aware of the facts constituting the offence and applied its mind for the same and any subsequent fact which may come into existence after the resolution granting sanction has been passed, is wholly irrelevant. The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to government servants against frivolous prosecutions and must therefore be strictly complied with before any prosecution can be launched against the public servant concerned..."*

23. The Hon'ble Supreme Court of India in the case of ***CBI v. Ashok Kumar Aggarwal (2014) 14 SCC 295*** has held as under:

> *"16. In view of the above, the legal propositions can be summarised as under:*

16.1 The prosecution must send the entire relevant record to the sanctioning authority including the FIR, disclosure statements, statements of witnesses, recovery memos, draft charge sheet and all other relevant material. The record so sent should also contain the material/document, if any, which may tilt the balance in favour of the accused and on the basis of which, the competent authority may refuse sanction.

16.2 The authority itself has to do complete and conscious scrutiny of the whole record so produced by the prosecution independently applying its mind and taking into consideration all the relevant facts before grant of sanction while discharging its duty to give or withhold the sanction.

16.3 The power to grant sanction is to be exercised strictly keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.

16.4 The order of sanction should make it evident that the authority had been aware of all relevant facts/materials and had applied its mind to all the relevant material.

16.5 In every individual case, the prosecution has to establish and satisfy the court by leading evidence that the entire relevant facts had been placed before the sanctioning authority and the authority had applied its mind on the same and that the sanction had been granted in accordance with law."

24. Thus, the order of sanction should speak for itself and make it evident that the sanctioning authority had gone through the entire set of record, relevant for the purposes of determining as to whether a *prima facie* case is made out against an accused, and then accorded sanction under Section 19 of P.C. Act, 1988. The sanctioning authority is required to peruse the entire record produced by the prosecution without any bias and then either provide the sanction or reject the request for sanction.

25. Moving to the errors pointed out by the learned counsel for appellant, in the last para of third page of the sanction order (Ex. PW-

1/A), it is mentioned that the presence of Phenolphthalein in hand washes of the accused/appellant which confirmed the acceptance and recovery of the bribe money was proved through CFSL report no. CFSL-2009/C-0030 dated 27.03.2008. As contended by learned counsel for appellant, since the alleged incident is of 10.01.2009, there cannot be any report dated 27.03.2009. However, a perusal of record shows that the said CFSL report, numbered as CFSL-2009/C-0030, was prepared on 27.03.2009, which has been mentioned as 27.03.2008 in the sanction order. This error appears to be more of a kind of typographical error. Further, it is also noted that the sanction order does not bear any date on which the same was signed by PW-1. These errors could have been caused on part of PW-1 himself, or because PW-1 had merely signed on the contents of draft sanction order without himself perusing the relevant materials and the details thereof mentioned in the draft sanction order. But these errors alone, in the opinion of this Court, are not sufficient enough to shake the entire basis of the sanction order passed by PW-1.

26. However, it is noteworthy that PW-1, in his cross-examination, has admitted that he did not go through the recordings prepared by the CBI qua the demand of bribe by appellant. This shows that either the sanctioning authority did not deem it appropriate to hear the recordings which were allegedly going to prove or disprove the demand of bribe by the appellant, or that the said recordings were not even placed before the sanctioning authority. These circumstances highlight that there has been a lack on the part of sanctioning authority (PW-1) in application of mind while according sanction against the appellant. This Court,

thus, cannot accept the view of the learned Trial Court that a bare perusal of the sanction order, along with the statement of PW-1 that he had applied his mind, reflects that the sanctioning authority has passed this order after due application of his mind.

27. Before any further observation, it will be pertinent to refer to Section 19(3)(a) of the P.C. Act, 1988 which is as under:

> *"Notwithstanding anything contained in the Code of Criminal Procedure, 1973 —*
> *(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;"*

Further, Section 19(4) of the P.C. Act, 1988 provides as under:

> *"In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings."*

28. In ***Prakash Singh Badal and Anr. v. State of Punjab and Ors. (2007) 1 SCC 1***, the Apex Court, while interpreting Section 19(3) and 19(4) of P.C. Act, 1988 observed as under:

> *"29. ...The effect of sub-sections (3) and (4) of Section 19 of the Act are of considerable significance. In Sub-Section (3) the stress is on "failure of justice" and that too "in the opinion of the Court". In sub-section (4), the stress is on raising the plea at the appropriate time. Significantly, the "failure of justice" is relatable to error, omission or irregularity in the sanction. Therefore, mere error, omission or irregularity in sanction is considered fatal unless it has resulted in failure of justice or has*

> *been occasioned thereby. Section 19(1) is a matter of procedure and does not go to root of jurisdiction..."*

However, the Apex Court in ***State of Karnataka v. Ameerjan (2007) 11 SCC 273*** has observed as under:

> *"17. Prakash Singh Badal, therefore is not an authority for the proposition that even when an order of sanction is held to be wholly invalid inter alia on the premise that the order is a nullity having been suffering from the vice of total non-application of mind..."*

29. Therefore, in view of the legal propositions discussed hereinabove, this Court shall not make the irregularities in the sanction order as the sole criteria for determining as to whether the appellant is entitled to acquittal or not. The evidence on record and the impugned judgment passed in light of the statement of the witnesses of the case will have to be anaylsed.

ii. Demand, Acceptance and Recovery of Bribe: Analysis of Testimonies and Electronic records

30. The offence under Section 7 of the P.C. Act, 1988 relating to public servants taking bribe requires a demand of illegal gratification and the acceptance thereof. The proof of demand of bribe by a public servant and its acceptance by him is *sine qua non* for establishing the offence under Section 7 of the Act.

31. The learned Trial Court in the impugned judgment has held that the testimonies of PW-8 (complainant), PW-9 (shadow witness), PW-11 (trap laying officer) and PW-12 (recovery witness) prove the

demand of bribe money by the appellant, its acceptance and recovery of the same from the conscious possession of appellant.

> *"36. According to Recovery Memo Ex PW 8/C tainted amount of Rs.15,000/- was recovered by PW 12 Amit Khurana. Prosecution has produced the evidence that accused had demanded illegal gratification of Rs.15,000/- from the complainant and accepted the same which was also recovered from his conscious possession. According to evidence produced by the prosecution accused suddenly after getting his left hand freed thrown away the tainted GC notes from his left side pant pocket, which were recovered by PW-2 from the ground. Complainant Harish Kumar, shadow witness Sanjay Arora, recovery witness Amit Khanna and TLO Inspector Surinder Singh have supported this version.*
>
> ***
>
> *41. From the above quoted portion of statements of witnesses demand of bribe money by the accused, its acceptance and recovery of the same from the conscious possession of accused is proved on the judicial file."*

32. After referring to the reliable portion of transcription of recordings, it was held by learned Trial Court that the prosecution has also produced and proved the recorded conversation between appellant and complainant, recorded during the pre-trap proceedings from CBI office and on the spot transcription to prove the demand of bribe by the appellant and its acceptance.

33. While analysing other arguments advanced by both the parties, certain important observations were made by the learned Trial Court, which are reproduced hereinunder:

> *"...91. In a prosecution for the offence of bribery the conduct of accused is relevant u/s 8 of Evidence Act. When the accused was challenged regarding acceptance of bribe amount he kept mum or tender apology and had not given any explanation, now his*

defence that complainant has forcible inserted money in his pocket appears to be after thought, particularly when no such defence has been put to shadow witness recovery witness and TLO...

***

93. From the above discussion it is again proved that accused Joginder Singh Malik accepted Rs.15,000/- voluntarily and consciously which was also recovered from his conscious possession.

94. When it is proved that there was voluntary and conscious acceptance of the money by the accused, there is no further burden cast on the prosecution to prove by direct evidence the demand or motive, in view of Section 20 of PC Act, 1988. It has been held so by our Hon'ble Supreme Court in B. Noha v. State of Kerala, 2006 IV AD 465.

***

99. The contradiction mentioned in annexure filed with the written submissions on behalf of accused in any way cannot be called material contradiction. Such contradictions are bound to come in the statement of witnesses because of the passage of rime and other reason. These contradictions are not of substantive nature. Court cannot expect a parrot like repetition of the version by the witnesses.

***

102. Ld Defence counsel argued that complainant was having a motive to falsely implicate the accused in this case because accused has taken action against him, hence complainant is pot a trust worthy witness. There is evidence on the file that accused had issued notice against complainant and on the objections raised by accused an amount of about Rs. Three lacs was deducted from his bill. Evidence of complainant cannot be rejected merely on this ground particularly when his evidence has been duly corroborated by other witnesses, recorded conversation and circumstantial evidence.

***

111. I have carefully gone through all the authorities relied upon by Ld Defence counsel in support of his arguments...

***

> *113. In Suresh Kumar Vs. State of Haryana, 2009(4) Criminal Court Cases 962(P&H) it is held that shadow witness was standing at a distance from where he could not hear the demand. As discussed in foregoing pages of this judgment it is proved that shadow witness in this case had seen the accused demanding the bribe by making gesture from his hand. Demand is also proved from the tape recorded conversation hence the facts of this authority are different then the case in hand..."*

34. Learned counsel appearing for CBI submits that the learned Trial Court has rightly held that the testimonies of the witnesses as well as the recordings and their transcriptions establish the case of prosecution beyond reasonable doubt that there was demand, acceptance and recovery of bribe in the present case.

35. On the contrary, learned counsel for appellant, with regard to demand of bribe on 09.01.2009, submits that as per the Verification Memo of complaint dated 09.01.2009, the telephonic as well as on the spot conversation between the complainant and appellant was recorded, and a transcript of same was also prepared. In the said memo, it has been claimed that the appellant asked the complainant to come at Delhi Cantt. Railway Station on 10.01.2009 along with the bribe amount, but the said fact is neither recorded in the alleged audio recording nor is provided in any transcript. He further submits that the alleged on the spot conversation between the complainant and appellant on 09.01.2009 was not heard even by shadow witness PW-9.

36. With regard to demand of bribe on 10.01.2009, learned counsel for appellant submits that as per the Handing Over Memo, the complainant was to be accompanied by PW-9 as a shadow witness on the day of trap so that an independent person could witness the alleged

transaction between the appellant and the complainant. But, as per the Recovery Memo and testimony of PW-9, he neither heard the conversation nor saw any transaction. Even as per TLO's version recorded in recovery memo and his testimony, when he asked the shadow witness to narrate the incident, the shadow witness expressed his inability since he could neither see the transaction nor overhear the conversation. It is argued by learned counsel that there are glaring contradictions in the statements of the complainant also as far as demand of bribe by the appellant is concerned.

37. It is submitted by learned counsel for appellant that as per prosecution, the appellant herein, after being caught by the raiding party had forcibly freed himself and thrown the money on the ground. This contention is not supported vide the statement of TLO as well as both the independent witnesses (PW-9 and PW-12). This contention is even not supported by the testimony of Insp. Rajesh Chahal and Insp. MK Upadhyaya.

38. It is contended that the complainant had a motive to falsely implicate the appellant since appellant had given a written complaint to PW-5 against the complainant who had unauthorizedly occupied the Railway Godowns, and a letter was also issued by PW-5 to the complainant to vacate the said premises within 10 days. Appellant had also highlighted various short comings in the work executed by the Complainant, which has also annoyed the complainant.

39. I have heard and gone through the submissions on behalf both the parties as well as the observations of learned Trial Court in respect of demand, acceptance and recovery of bribe from the appellant.

40. One fact that is absolutely clear from the evidence on record as well as the testimonies is that the shadow witness (PW-9) in the present case, who was supposed to act as a shadow of complainant and witness the transactions and hear the conversations, did not see or hear any of the transactions or conversations which allegedly took place between the complainant and appellant, either on 09.01.2009 i.e., before trap or on 10.01.2009 i.e., on the day of trap. The same has also been admitted by PW-9 in his cross-examination. Even though PW-9 was asked to give a signal by scratching his head after the transaction of bribe was over, he did not do any of such sort and rather it was the complainant who gave this signal, because PW-9 could not see or hear anything. Therefore, the testimony of PW-9 with regard to demand or acceptance of bribe by appellant is of no use to the benefit of prosecution, since the same does not disclose any demand or acceptance on part of appellant.

41. A shadow witness, in any given case, must be in a position to depose not only about the passing of money but also about the conversation which takes place between a complainant and an accused so as to find out the basis for the exchange of money/bribe. As expressed by Hon'ble Supreme Court in ***Meena v. State of Maharashtra (2000) 5 SCC 21***, law always favours the presence and importance of a shadow witness in the trap party, who is supposed to be there not only to see but to overhear what happens and how it happens also.

42. Interestingly, the learned Trial Court in para 113 of the impugned judgment, while attempting to differentiate a judgment upon which reliance had been placed by the counsel for accused, went on to observe

that the it was proved that shadow witness in this case had seen the accused demanding the bribe by making gesture from his hand. However, the case of prosecution, including the testimony of trap laying officer as well as of shadow witness, has always been that shadow witness could not see any transaction happening between the appellant and complainant which could shred any light on the aspect of demand.

43. The second independent witness/Recovery witness (PW-12) was also, admittedly, not a witness to any of the alleged conversations and transactions relating to demand or acceptance of bribe. It is an admitted fact that trap laying officer (PW-11) also could not hear or see any of the conversation or transaction that allegedly took place between the complainant and appellant. In view of the same, the observations of learned Trial Court to the extent that testimonies of PW-9, PW-11 and PW-12 prove the demand and acceptance of bribe by the appellant are far beyond imagination.

44. The complainant in the present case is the sole witness of the alleged demand and acceptance of bribe by the appellant. Attention of this Court was also drawn towards some discrepancies in complainant's version as to how the appellant had demanded the bribe from him. As per the verification memo dated 09.01.2009, the verifying officer SI MK Upadhyay had only heard the tape recorded conversation which according to him revealed demand on part of appellant. However, it is a matter of record that no transcription of any audio recording has been produced by the prosecution with respect to any of the conversation that took place on 09.01.2009 at Sarai Rohilla Station inside the

chamber/office whereby the appellant demanded Rs.15,000/- from the complainant and asked him to bring the same the very next day. The only witness to this alleged conversation was complainant. The complainant in his statement under Section 161 Cr.P.C. had stated that appellant 'by gestures' had directed him to meet him alongwith the bribe amount on the next morning. But before learned Trial Court, he deposed that appellant's demand was through a gesture as well as saying in meek tone "*Laye Ho*" and that he had asked to come on next day i.e. 10.1.2009 in morning for passing on the said amount at Delhi Cantt. Railway Station. The same discrepancy was admitted by complainant himself in the cross-examination. Further, as per the Recovery Memo and also as per complainant's statement under Section 161 Cr.P.C., the appellant had demanded Rs.15,000/- on the day of trap by gesture of hands pursuant to which the complainant took out the tainted bribe amount and handed over the same to appellant. However, the complainant in his statement before the learned Trial Court has deposed that the appellant had demanded the bribe amount from him by gestures and orally, but the voice was not audible because a train was passing at that time, thus, creating noise.

45. Further, it was also contended on behalf of appellant that testimony of DW-5 Sh. Vijay Kumar, who happened to be a carpenter in the Indian railways, has not been appreciated by the learned Trial Court who was the sole eye witness to the alleged transaction of bribe and has clearly witnessed the entire incident and deposed that he has seen the complainant trying to insert money in the appellants pant pocket, and thus the acceptance of bribe as alleged was not voluntary

rather a forceful act. The learned Trial Court has dealt with the testimony of DW-5 and held the same to be untrustworthy, in the manner as under:

> *"110. DW5 Vijay Kumar has stated that on 10.1.2009, his duty was on platform No.4 after departure of train Ferry Queen at about 9.05 am, he went to platform No.l from where he proceeded towards Railway Store. In the Railway store he saw that Sh JS Malik was counting some articles facing the wall and Harish Kumar went towards him and tried to insert something in his pant pocket but Sh Malik avoided the same by striking his hand on the hand of Harish Kumar and he saw that some currency notes bad fallen on the ground thereafter Harish Kumar and Mr Malik came out of the Railway store and JS Malik was apprehended near the entrance of store by 3 or 4 persons. According to statement of this witness Sh Malik had stopped Harish Kumar from putting currency notes in his pocket by striking his hand on the hand of Harish Kumar. From the foregoing discussion of this judgment it is proved that phenolphihalein powder was found in the left side pant pocket of accused which belies the version of this witness. Except to the complainant this defence has not been put to any other witness i.e., shadow witness, recovery witness and TLO on behalf of accused m their cross examination. Thus this defence appears to be after thought and untrustworthy.*

46. In such a situation, on one hand, there existed, before the learned Trial Court, an uncorroborated testimony of complainant PW-8 and on the other, an uncorroborated testimony of DW-5, as far as demand and acceptance of bribe by the appellant is concerned. It must be noted that the discrepancies in the complainant's versions specifically relates to as to how the appellant had put forward his demand for bribe, on both 09.01.2009 and 10.01.2009. At a first look, these may appear as minor discrepancies, but in view of the fact that no other prosecution witness

was actually a witness to these conversations and transactions and that there is lack of relevant transcriptions of recordings also in this regard and further that a defence witness has deposed contrary to the version of complainant, these discrepancies become material at least to the effect that the conviction cannot rest solely upon the complainant's version and thus, benefit of doubt should have been given to the appellant. It is also an admitted fact that the appellant had submitted a complaint against the complainant PW-8 for having unauthorizedly occupying the railway godowns, on the basis of which a letter dated 28.12.2008 was also issued by PW-5 to the complainant to vacate the said premises within 10 days. Learned Trial Court in para 102 of impugned judgment has also recorded that there was evidence on record that appellant had got notice issued against complainant and on the objections so raised, an amount of about Rs. Three lacs was deducted from his bill.

47. Learned counsel for the respondent had relied upon the judgment of ***B. Noha v. State of Kerala (supra)*** wherein it was held by the Apex Court that when voluntary and conscious acceptance of the money is proved, there is no further burden cast on the prosecution to prove by direct evidence, the demand or motive. Learned Trial Court has also held on similar lines. However, in view of the previous discussion, this legal proposition cannot be held to be applicable in the present case since even the voluntary acceptance of bribe by the appellant has not been proved beyond reasonable doubt.

48. Now coming to the issue of recovery of tainted amount from the appellant, the case of the prosecution has been that after the appellant

had been caught by the CBI officers, he suddenly after getting his left hand freed from the clutches of the officers had thrown away the tainted GC notes from his left side pant pocket, which were recovered by PW-12 from the ground. The learned Trial Court has held that the testimonies of complainant, shadow witness, recovery witness and trap laying officer establish the said fact.

49. A perusal of the testimonies of the independent witnesses reveal that the recovery witness (PW-12) in his cross-examination stated that when he reached the spot, the appellant was already surrounded by the other team members and that he cannot tell the name of the CBI officer who had caught hold the appellant. He further stated that he had neither seen the accused getting his hand free nor seen him throwing the currency notes on the ground. Similar stand was taken by the shadow witness PW-9 in his cross-examination whereby he stated that he did not remember how the accused was apprehended by CBI. Further, he had also not seen accused getting his hand free from CBI officers, and that he did not remember whether currency notes were picked up by CBI officer from the ground. Thus, both the independent witnesses have not supported the case of prosecution with respect to appellant getting his hand freed and throwing away the tainted money from his pocket. These statements of independent witnesses have been ignored by the learned Trial Court, rather the Trial Court has held that independent witnesses have fully supported the case of prosecution in this regard. Therefore, only the testimony of complainant and trap laying officer sustains.

50. Trap Laying Officer (PW-11), had testified before the Trial Court

that SI MK Upadhaya had caught hold off the right hand and Inspector Rajesh Chahal had caught hold off left hand from the wrist of the appellant. But these two officers were not examined before the Trial Court, as was also submitted by learned counsel for appellant.

51. The learned Trial Court has observed in the impugned judgment that phenolphthalein on the hand of accused and left side pant pocket has been confirmed, which also confirms the recovery of tainted money from the appellant. The said observation is as under:

> *"79. Complainant Harish Kr Anand, Shadow witness Sanjay Arora and recovery witness Amit Khnrana, TLO Inspector S S BhuIIar have stated that wash of left hand of accused and left hand side pant pocket of accused was taken with the solution of sodium carbonate prepared in water which had turned pink in colour. There is no cross-examination of any of these witnesses on this point on behalf of accused, thus there is no reason to disbelieve it.*
>
> *80. PW4 Sh. VP Ramteke, Senior Scientific officer CFSL who has chemically examined the left hand wash, of accused and wash of the left side pant pocket of the accused has stated that after chemical analysis of both the washes, he found presence of phenolphthalein and sodium carbonate in both the samples of the washes. Thus the presence of phenolphthalein on the hand of accused and left side pant pocket has been confirmed..."*

52. However, as argued on behalf of appellant, DW-5 had seen the complainant trying to forcibly insert money in the pocket of appellant, who then had thrown away the said money by striking his hand. Thus, there are testimonies of complainant and trap laying officer on one hand, and a testimony of DW-5 on the other, which offer contrarian views on the detection of phenolphthalein on the hand and pant of the appellant. Declaring the testimony of DW-5 untrustworthy, the learned

Trial Court, in view of the testimonies of the witnesses present on the sport and of senior scientific officer of CFSL (PW-4), has held that the bribe amount was undoubtedly recovered from the appellant.

53. Be that as it may, in absence of any proof of demand or acceptance of bribe, mere recovery of tainted notes and conduct of phenolphthalein tests cannot establish the offence under the P.C. Act. In the case of ***P. Satyanarayana Murthy v. District Inspector of Police, State of Andhra Pradesh and anr. (2015) 10 SCC 152***, the Apex Court has summarised the well-settled law on the subject which reads thus:

> *"23. The proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1)(d)(i) and (ii) of the Act and in absence thereof, unmistakably the charge therefor, would fail.* ***Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be 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****."*
>
> (emphasis supplied)

54. In the case of ***A. Subair v. State of Kerala (2009) 6 SCC 587***, it was held as under:

> *"15. ...In other words, in the absence of proof of demand or request from the public servant for a valuable thing or pecuniary advantage, the offence under Section 13(1)(d) cannot be held to be established...*
>
> ***
>
> *30. ...Mere recovery of currency notes (Rs. 20/- and Rs.5/-) denomination, in the facts of the present case, by itself cannot be held to be proper or sufficient proof of the demand and acceptance of bribe.*

31. When the evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence. It is true that the judgments of the courts below are rendered concurrently but having considered the matter thoughtfully, we find that the High Court as well as the Special Judge committed manifest errors on account of unwarranted inferences. The evidence on record in this case is not sufficient to bring home the guilt of the appellant. The appellant is entitled to the benefit of doubt."

55. The Hon'ble Apex Court in ***Rakesh Kapoor v. State of Himachal Pradesh 2012 13 SCC 552***, held as under:

"20. Coming to the next argument that there was absolutely no demand for bribe and in the absence of such claim by the accused duly established by the prosecution, the conviction cannot be sustained. In support of the above claim, learned counsel for the appellant relied on the decision of this Court in Banarsi Dass vs. State of Haryana, (2010) 4 SCC 450. It was an appeal under Article 136 of the Constitution of India filed against the judgment and order of conviction dated 20.11.2002 passed by the learned single Judge of the High Court of Punjab and Haryana at Chandigarh. In that case, it was contended before this Court that there is no evidence to prove demand and voluntary acceptance of the alleged bribe so as to attract the offence under Section 5(2) of the Prevention of Corruption Act, 1947. The other contentions were also raised regarding merits with which we are not concerned. The accused was charged for the offence punishable under Section 5(2) of the 1947 Act as well as Section 161 (since repealed) of the IPC. In para 23, this Court held that:

> *"23.* ***To constitute an offence under Section 161 IPC, it is necessary for the prosecution to prove that there was demand of money and the same was voluntarily accepted by the accused"****.*

It was further held that

> *"23. ...Similarly in terms of Section 5(1)(d) of the Act,* ***the demand and acceptance of the money for doing a favour in discharge of his official duties is sine qua non to the conviction of the accused****".*

21. In para 25, this Court quoted the decision rendered in C.M. Girish Babu vs. CBI, (2009) 3 SCC 779 and held that:

> *"25. ...****Mere recovery of money from the accused by itself is not enough in the absence of substantive evidence of demand and acceptance****."*

In the sama para, a reference was also made to Suraj Mal vs. State (Delhi Admn.) (1979) 4 SCC 725 wherein this Court took the view that ***mere recovery of tainted money from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable.*** *This Court further held that mere recovery by itself cannot prove the charge of the prosecution against the accused in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe. After underlying the above principles, and noting that 2 prosecution witnesses turned hostile, while giving the benefit of doubt on technical ground to the accused, this Court, set aside the judgment of the High Court and acquitted the accused of both the charges i.e. under Section 161 IPC and under Section 5(2) of the 1947 Act..."*

(Emphasis supplied)

56. Similarly, the Hon'ble Supreme Court in ***Krishan Chander v. State of Delhi (2016) 3 SCC 108*** observed that demand of bribe is *sine qua non* to convict the accused for offences punishable under Section 7 and 13(1)(d) read with Section 13(2) of the PC Act.

57. Even to invoke the presumption under Section 20 of PC Act, it is essential that the demand of bribe must have been established. In ***B. Jayaraj v. State of Andhra Pradesh (2014) 13 SCC 55***, the Apex Court

has held as under:

> *"9...In so far as the presumption permissible to be drawn under Section 20 of the Act is concerned, such presumption can only be in respect of the offence under Section 7 and not the offences under Section 13(1)(d)(i)(ii) of the Act. In any event, it is only on proof of acceptance of illegal gratification that presumption can be drawn under Section 20 of the Act that such gratification was received for doing or forbearing to do any official act. Proof of acceptance of illegal gratification can follow only if there is proof of demand. As the same is lacking in the present case the primary facts on the basis of which the legal presumption under Section 20 can be drawn are wholly absent."*

58. Further in ***State of Maharashtra v. Dnyaneshwar Laxman Rao (2009) 15 SCC 200***, the Hon'ble Supreme Court expressed as under:

> *"16. Indisputably, the demand of illegal gratification is a sine qua non for constitution of an offence under the provisions of the Act. For arriving at the conclusion as to whether all the ingredients of an offence, viz., demand, acceptance and recovery of the amount of illegal gratification have been satisfied or not, the court must take into consideration the facts and circumstances brought on the record in their entirety. For the said purpose, indisputably, the presumptive evidence, as is laid down in Section 20 of the Act, must also be taken into consideration but then in respect thereof, it is trite, the standard of burden of proof on the accused vis-`-vis the standard of burden of proof on the prosecution would differ. Before, however, the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. Even while invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt."*

59. In ***Mahavir Singh v. State 2014 SCC OnLine Del 290***, it was

highlighted by this Court that:

> *"18. ...For the purposes of Sections 7, 13(2) read with 13(1) (d) of the PC Act require the trial Court to be satisfied that there was a demand of a bribe by the accused and it was accepted by the accused. The presumption under Section 20 of the PC Act presupposes the prosecution establishing beyond reasonable doubt that there was demand and acceptance of illegal gratification. In K.S. Panduranga v. State of Karnataka (2013) 3 SCC 721, the Supreme Court explained "It is well settled in law that demand and acceptance of the amount as illegal gratification is sine qua non for constitution of an offence under the Act and it is obligatory on the part of the prosecution to establish that there was an illegal offer of bribe and acceptance thereof"..."*

60. Another issue before this Court, as raised by the appellant, is the legality and admissibility of recordings and transcriptions of the conversations that took place between the complainant and appellant on 09.01.2009 and 10.01.2009. Learned Trial Court has relied upon certain parts of the transcriptions, considering them as reliable, and held that the said transcription revealed the demand and acceptance of bribe. It was further held as under:

> *"62. The recorded conversation and its transcription have also been corroborated by the evidence of PW8. In the transcription there is reference with regard to demand of tea/taking of tea. Complainant in this regard has also stated in his statement as follows:*
>
> > *"Sh. Joginder Singh Malik expressed the desire to take tea. We both took tea. After taking the tea Malik demanded the money by gesture as well as orally, however voice was not audible because a train was passing at that time and creatmg noise. Accused had extended his left hand towards me for receiving the bribe amount."*
>
> *63. Had the accused was not Interested in the demand/*

acceptance of bribe from complainant he would not offered him tea.

64. From a bare reading of the above quoted portion of transcription, demand and acceptance of the same by accused can be well inferred..."

61. Learned counsel for the appellant has submitted that the conversation between the complainant and the appellant on 09.01.2009 i.e., during the verification of the written complaint by the CBI was recorded on a Digital Voice Recorder. The recording so done in the DVR was transferred in a cassette with the help of a Mini Cassette Recorder and the said cassette was thereafter marked as 'Q-1 '. Similarly, as per the Specimen Voice Recording Memo dated 10.01.2009, the specimen voice of the Appellant was recorded in a DVR which was subsequently transferred in a blank audio cassette with the help of a Mini Cassette player and this audio cassette was marked as 'S-1'. But, interestingly as per the CFSL report, both the cassettes Q-1 and S-1 were found to be normal audio cassettes "Sony EF-60". It is not borne out from the record of the entire case as to how the recording in the DVR could have been transferred to a normal audio cassette using a Mini Cassette recorder. It is a matter of common knowledge that Sony EF-60 is a normal audio cassette which cannot be played or recorded in a Mini Cassette Player/Recorder.

62. It is further submitted that the conversation at the time of the alleged incident was also recorded in the DVR which was subsequently transferred into a blank audio cassette using a Compact cassette recorder and this audio cassette was thereafter marked as 'Q-2'. As per

the CFSL report the cassette Q-2 was a normal audio cassette Sony EF-60. However, admittedly the said recording was not audible and the voices contained therein were indiscernible due to excess noise contained therein. Thus, different recording instruments were used to prepare the audio cassettes in the present case and there could have been no confusion between a Mini Cassette and a Compact/Normal Cassette.

63. It was argued by the counsel for appellant that original recording instruments were neither sent to CFSL for forensic examination nor were produced before the learned Trial Court. Even no certificate under 65B of Evidence Act has been produced by the prosecution for any of the recordings made by them.

64. I have heard the submissions and perused the record. I have also gone through the reliable portions of transcript, as held by the Trial Court, which were mentioned in para 59 of the impugned judgment. In the transcription of Q-1, i.e., the telephonic as well as on the spot conversations dated 09.01.2009, there is no conversation at all which could establish demand of bribe being made by the appellant. As also observed in preceding discussion, the transcription of Q-1 has no mention of any conversation that took place inside the appellant's office on 09.01.2009 whereby he had allegedly asked the complainant to come on the next day with bribe. Therefore, without any *iota* of doubt, cassette Q-1 and its transcription do not provide any proof of demand of bribe in the present case.

65. As far as cassette Q-2 and its transcription is concerned, it will be relevant to consider the report of CFSL and the testimony of CFSL

officer (PW-6), which reveal that when the cassette was played by PW-6, it was found that the recording in the cassette was highly noisy due to which the voices in the cassette were indiscernible. Hence, the same was not compared with the specimen voice of the appellant. In the cross-examination, it was also accepted by PW-6 that the transcription of only Q-1 was sent to him that of Q-2 was not sent by the CBI. It is also pertinent to note that complainant PW-9 deposed that on the day of incident, after taking the tea the appellant had demanded the money by gesture as well as orally, however voice was not audible because a train was passing at that time and creating noise. He further accepted in his cross-examination that words "*Haa Kar Doonga*" as mentioned in the transcription was not recorded in the cassette Q-2 since the same was not audible. But the learned Trial Court has also included the words "*Haa Kar Doonga*" in the reliable portion of the transcription, as mentioned in para 59 of the impugned judgment. Therefore, in view of the lack of scientific proof with respect to cassette Q-2 as well as the fact that even its transcription was not forwarded by CBI to CFSL, probably because the same was not audible at all due to heavy noise, and then producing a transcription of cassette Q-2 raises serious doubt about the case of prosecution. Under these circumstances, the transcription of cassette Q2 cannot be relied upon.

66. Even otherwise, it has been rightly contended on behalf of the appellant that the original instruments related to recordings, i.e. original digital voice recorders, original mini cassettes, original mini cassette recorder and compact cassette recorder, were neither sent to CFSL for forensic examination nor placed on record. As also highlighted by the

learned counsel for appellant, the verification memo and specimen voice recording memo show that the recordings were made using DVRs and then were transferred to blank cassettes using a mini cassette recorder. But a perusal of record shows that normal cassettes "Sony EF-60, and not mini cassettes, were sent to the CFSL for examination as well as placed before court. It is not clear as to how could the audio from DVR be transferred to normal cassettes using a mini cassette recorder, or whether any other transfer also took place whereby the audios were transferred to normal cassettes.

67. The observations of a Coordinate bench of this Court in ***Ashish Kumar Dubey v. State through CBI 2014 (142) DRJ 396***, based on similar facts as those of the present case, are as under:

> *"36.* ***Another important aspect is the recording of the conversation that allegedly took place between PW6 and the Appellant, which was done by PW6 with the help of an MCR which PW5 had apparently given to her. If indeed it was a micro cassette, then it was for the prosecution to explain how the parcel Q3 given to the CFSL contained a regular TDK D-60 cassette and not a micro cassette. It is not clear when the contents of the micro cassette were transferred to a larger cassette for being given to the CFSL.*** *Also, it appears that the MCR given by PW5 to PW6 on 19th August 2002 was different from the MCR given to him by PW11 during the pre-raid proceedings for which the handing over memo Ex. PW1/G was drawn up.*
>
> *37. The next aspect of the matter as regards the conversation between PW6 and the Appellant which purportedly took place on 19th August 2002 is that the device by which the conversation was recorded was not itself examined. This was important since a specific question was put to the scientific expert (PW3) whether the device was tampered or not. In his cross-examination, PW3 stated: "As I was not asked to give opinion whether the cassette*

was tampered or edited, I have not expressed any opinion on this aspect."

38. At this stage, it is important to recall the requirements of law, as spelt out in Ram Singh v. Col. Ram Singh which read as under:

> *"(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.*
> *(2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence - direct or circumstantial.*
> *(3) Every possibility of tampering with or erasure of a part of a tape- recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.*
> *(4) The statement must be relevant according to the rules of the Evidence Act.*
> *(5)* ***The recorded cassette must be carefully sealed and kept in safe or official custody.***
> *(6)* ***The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances****."*

39. The above statement of PW3 was in the context of the third test which required ruling out "every possibility of tampering with or erasure of a part of a tape recorded statement." What the learned trial Court in the instant case has done is examined the 5th requirement that "the recorded cassette must be carefully sealed and kept in safe or official custody." The learned trial Court has failed to notice that the third requirement spelt out in Ram Singh v. Col. Ram Singh was not satisfied in view of the above answer of PW3. The official safety of the parcel contained in the cassette is not the same thing as ruling out the possibility of tampering with a tape recorded statement.

40. In Nilesh Dinkar Paradkar v. State of Maharashtra (2011) 4 SCC 143, the Supreme Court referred to the judgment in R. V. Robson (1972) 2 All ER 699 where it was observed as under:

> *"....**The determination of the question is rendered the more difficult because tape recordings may be altered by the transposition, excision and insertion of words or phrases and such alterations may escape detection and even elude it on examination by technical experts**."*

41. Both in Ram Singh v. Col. Ram Singh and Nilesh Dinkar Paradkar v. State of Maharashtra reference was made to Archbold Criminal Pleading, Evidence and Practice (Chapter 14) which lays down that the factors that would be relevant for the purpose of correct identification of voice. One of this is "quality of the recording of the disputed voice." Reference was also made to American Jurisprudence 2d (Vol.29) according to which for admissibility of a sound recording it had to be shown inter alia that "the recording device was capable to taking and testimony"; that the recording was authentic and correct and "the manner of the preservations of the recording" was also shown. This is apart from the fact that tape recorded evidence can only be used as a corroboration evidence.

*42. **The MCR used in the present case by PW6 to record the conversation was not submitted to CFSL. Without the device being examined and without the cassette itself being examined for ruling out the possibility of tampering, one of the important requirements spelt out in Ram Singh v. Col. Ram Singh was not satisfied in the present case. This rendered the Q3 cassette an inadmissible piece of evidence**..."*

(Emphasis supplied)

68. Moreover, no certificate under Section 65B of the Indian Evidence Act has been placed on record by the prosecution to support the admissibility of their recordings.

69. The law regarding admissibility of electronic evidence, as introduced in the Indian Evidence Act, 1872 by way of an amendment

in the year 2000, was elaborated by the Hon'ble Supreme Court in ***Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473*** as under:

> *"16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.*
>
> *17. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.*
>
> *18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.*
>
> ***
>
> *22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (supra), does not lay down the*

correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

23. The appellant admittedly has not produced any certificate in terms of Section 65B in respect of the CDs, Exhibits-P4, P8, P9, P10, P12, P13, P15, P20 and P22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground..."

70. This court in ***Ankur Chawla v. CBI 2014 SCC OnLine Del 6461*** while following the principle laid down in ***Anvar P.V. (supra)***, held as under:

"16. To test the correctness of the aforesaid observations of the trial court, it has to be kept in mind that any electronic record is admissible in evidence only when it is in accordance with the procedure prescribed under Section 65B of the Indian Evidence Act, 1872.....

17. In the instant case, the impugned order is silent about there being any certificate under Section 65B of the Indian Evidence Act, 1872 in respect of the audio and video CDs and even during the course of hearing, it was asserted on behalf of respondent-CBI that aforesaid mandatory certificate of 18th December, 2009 is there, but respondent-CBI has failed to show that such a certificate has been filed alongwith the chargesheet. Attention of this Court was not drawn to statement of any witness to show that inference of criminal conspiracy can be drawn against petitioners. Pertinently, although this Court is not required to look into photocopy of certificate under Section 65B of the Indian Evidence Act, 1872 furnished in respect of fifteen CDs in packet 'A' but there is no such certificate in respect of the seven CDs in

packet 'B' which is solely relied upon by the prosecution. Thus, aforesaid certificate (which is not on record) is of no avail. So, there is no point in now permitting the prosecution to place the original of such certificate on record. It was also not shown during the course of the hearing that when the CDs were prepared but since this case was registered on 23rd November, 2009 therefore these CDs must have been prepared soon thereafter and the certificate under Section 65B of the Indian Evidence Act, 1872 has to be of the date when the CDs were prepared but the photocopy of the aforesaid certificate shows that it was prepared on 18th December, 2009 and is thus of no avail..."

71. The decision of ***Anvar P.V. (supra)*** was affirmed, though with a few clarifications, by the Hon'ble Apex Court in ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors. (2020) 7 SCC 1*** holding that Section 65A and Section 65B of Indian Evidence Act fully govern the admissibility of electronic evidence under the Act, to the exclusion of the regular procedures provided in other parts of the Act. It was held that certificate under Section 65B(4) is a condition precedent to the admissibility of secondary evidence by way of electronic record, but the said certificate is unnecessary if the original document itself is produced and this can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him.

72. However, it will also be relevant to note that the aforesaid judicial decisions, dealing comprehensively with the issue of admissibility of electronic records and requirement of certificate under Section 65B of Indian Evidence Act, were rendered much later than the

decision in the present case. In the year 2009, the Court at most could have relied upon the decision of ***State (NCT of Delhi) v. Navjot Sandhu (2005) 11 SCC 600*** wherein the Hon'ble Apex, recognising the constraints of producing information contained in call records stored in huge servers, held that secondary evidence under Sections 63 and 65 of the Evidence Act could be produced for proving the contents of an electronic record, and that a certificate under Section 65B(4) was held to not be mandatory for producing electronic evidence. This view was subsequently overruled by the Apex Court in ***Anvar P.V. (supra),*** which has been further upheld in ***Arjun Panditrao Khotkar (supra).*** However, a perusal of impugned judgment reveals that the learned Trial Court has not dealt with the issue of admissibility of electronic evidence at all, though the statutory law regarding the same had already been in existence at the time of passing of impugned judgment.

73. Therefore, in view of the material available on record in the present case and the legal propositions discussed hereinabove, the audio recordings in the form of cassettes Q-1, Q-2 and S-1 cannot be treated as admissible pieces of evidence. Consequently, any inferences regarding demand or acceptance of bribe made from the audio recordings and their transcriptions are also not valid in law.

CONCLUSION

74. In view of the fact that (i) none of the independent witnesses heard or saw any kind of demand or acceptance of bribe on part of appellant on both 09.01.2009 and 10.01.2009, and (ii) when the complainant in the present case was the sole witness to the

conversations and transaction of demand and acceptance of bribe and there are certain discrepancies in his version as to how the appellant had demanded bribe from him on both the days, and further (iii) that voice recordings and their transcriptions also do not reveal any demand made by appellant, which otherwise are also inadmissible in evidence, this Court is unable to accept the view of learned Trial Court that the demand and acceptance of bribe has been clearly established by the prosecution, so as to convict the appellant for offences punishable under Section 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988.

75. This Court is of the view that the evidence brought on record by the prosecution was insufficient to return a finding of guilt against the appellant beyond all reasonable doubt.

76. For the aforementioned reasons, the impugned judgment dated 08.10.2010 and the order on sentence dated 13.10.2010 passed by learned Trial Court are set aside and the appellant is acquitted of the offences of which he has been charged and convicted.

77. The appeal is allowed accordingly.

SWARANA KANTA SHARMA, J

DECEMBER 8, 2022/kss