IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE CRIMINAL JURISDICTION

CRIMINAL APPEAL NO.23 OF 2009

Sharad Sabaji Tavhare,
Aged 50 yrs.,
Residing at Building No.104,
R.No.3561, Nehru Nagar,
Kurla (East),
Mumbai 74 .. Appellant.

V/s.

The State of Maharashtra,
Through ACB, BMU,
CR No.53/99,
(Notice to be served on Public
Prosecutor, High Court,
Appellate Side, Mumbai) ... Respondent.

WITH
CRIMINAL APPEAL NO.53 OF 2009

Mr. Ashok Eknath Desai,
Aged 47 years, residing at 403,
Manokamna Apartment, Bhatwadi,
Kisan Nagar No.3, Thane (W) .. Appellant.

v/s. (Org. Accd.No.2)

The State of Maharashtra
(At the instance of Anti-Corruption Bureau
B.M.U.) .. Respondent.

Mr. Satyavrat Joshi with Mr. Nitesh J. Mohite, Advocates for Appellant in Cri. Appeal No.23 of 2009.
Mr. M.K.Kocharekar i/by Mr. Pawan Mali, Advocates for Appellant in Cri.Appeal No.53 of 2009.
Mr. S.S.Pednekar, APP for the Respondent-State in both Appeals.

CORAM: SANDEEP K. SHINDE,J.
DATE : 30th June, 2018.

ORAL JUDGMENT:-

Both the Appeals under Section 27 of the Prevention of Corruption Act, 1988 (hereinafter referred to as the '**Act**') are preferred against the judgment and order dated 24.12.2008 whereby the Appellant in Appeal No.23 of 2009 has been convicted under Section 7 and sentenced to suffer RI for six months and fine of Rs.5000; and under Section 13(1)(d) of the Act and sentenced to suffer RI for one year and fine of Rs.5,000/-; whereas Appellant in Appeal No.53 of 2009 has been convicted under Section 7 r/w Section 12 and sentenced to suffer RI for six months and under Section 13(1)(d) r/w Section 13(2) of the Act and sentenced to suffer RI for one year and fine of Rs.1,000/-.

2 The Appellants are public servants, i.e., police constables attached to Nehru Nagar Police Station, Kurla.

3 The case of the prosecution is as under:

The Complainant Mr. Ayub Shaikh a labour contractor had undertaken a contract to repair the house of one Mr. Abdul Rahim, within the local limits of Nehru Nagar Police Station.

Accused No.1 was attached to the said police station as Assistant Police Inspector and accused no.2 was working as Police Constable. The Complainant would narrate in his complaint that on 3.10.1999, constable Mr. Jagtap attached to Nehru Nagar Police Station visited the site but since at the given point of time, Complainant was not present, Mr. Jagtap asked one, Nilkanth, employee of the complainant to accompany him to the police station and introduced to accused no.1. It appears from his complaint that accused no.1 told Nilkanth that if the complainant would wish to continue with repairing contract, he should pay Rs.1,000/- to him or else he would be forced to discontinue/stop the repairing work. The Complainant would further narrate that on 4.10.1999, he personally met accused no.1 and at that time, he was told by accused no.1 that since work of repairing, he was carrying on was unauthorised, he should pay Rs.1,000/- to him and if such amount was not paid, he would be forced to stop the work. His complaint further proceeds to say that accused no.1 told him to pay money in any case on 5.10.1999 at Shivsagar Hotel. It is the Complainant's case that accused no.1 asked him to make telephone call at 4 p.m. on 5.10.1999 from Shivsagar Hotel and thereafter he would depute someone to collect such money.

4 Mr. Ayub Shaikh thereafter lodged complaint with the Respondents which came to be registered as Crime No.53 of 1999 under Section 7 of the Act against accused no.1 only.

5 That after completing formalities of recording pre-trap panchanama in presence of panch witnesses, team proceeded to Hotel Shivsagar. It appears that the Complainant was accompanied by panch witness Vasant Khaire in Hotel Shivsagar and other members were waiting at a distance from the Hotel. It is prosecution case that the Complainant made phone call from Hotel Shivsagar to accused no.1 and after sometime one person came at Hotel Shivsagar on bicycle. The said person was accused no.2-Constable Desai. The Complainant, pancha Khaire and accused no.2 had a cup of tea in the hotel and after paying tea charges, when three of them were coming outside, the Complainant kept Rs.1,000/- in the pocket of accused no.2-Constable Desai. Thereafter, on pre-decided signal, raiding party consisting of Mr. Kishor Bawiskar-Investigating Officer, another pancha Mr. Prashant Bansode (P.W.3) and other members of raiding party caught hold of the accused no.2 with the tainted notes then found in his possession.

6 Raiding party along with the Complainant and accused

no.2 moved to the police station. That after completing required formalities, i.e., drawing the post-trap panchanama, completing running panchanama and having found bluish glow on the fingers of accused Desai, he was arrested.

7 That after completing investigation, charge-sheet was filed. Accused were tried for the offences punishable under Section 7,13(1)(d) read with Section 13(2) of the Act .

8 The learned trial Judge after appreciating the evidence on record convicted both the accused as aforesaid.

9 Aggrieved by the conviction as aforesaid, the present Appeal is preferred.

10 Heard Mr. Joshi the learned counsel for the Appellant in Appeal No.23 of 2009 and Mr. Kocharekar the learned counsel for the Appellant in Appeal No.53 of 2009. Also heard Mr. Pednekar the learned APP for the State. Perused the records and proceedings.

11 That before adverting to the arguments of the Appellants, it may be stated:

(I) Prosecution had examined only five witnesses;

(II) The Complainant did not support the prosecution case. He was declared hostile;

(III) Pancha witness P.W.2 though not declared

unfriendly to the prosecution was found a habitual stock, Panch Witness;

(IV) P.W.3 another pancha witness did not support the prosecution case;

12 Though ferist and the charge-sheet indicate that there were other members of the raiding party present on the spot, prosecution has not examined either of them. Mr. Nilkanth, an employee of the complainant who had been to Police Station and met accused no.1 has not been examined by the prosecution. Mr. Jagtap was also not examined.

13 The learned counsel appearing for the Appellants after taking me through the evidence of the prosecution, in principal have raised following questions for my consideration:

(1) Whether mere possession and recovery of currency notes from the accused no.2 without proof of demand was sufficient to bring home offence under Sections 7 and 13(1)(d) of the Act since in the given case demand of illegal gratification of bribe has not been proved by the prosecution ?

(2) That in absence of proof of 'demand' whether prosecution could have taken recourse to

presumption under Section 20 of the Act read with Section 114 of the Indian Evidence Act, 1872; as has been done.

(3) That recourse to the provisions of Section 114 of the Indian Evidence Act, 1872 taken by the learned Judge for convicting the accused was valid in law ?

(4) No evidence was let-in to establish that accused no.2 accepted tainted currency notes for and on behalf and on instructions of accused no.1.

14 The learned counsel for the Appellants have relied upon following five judgments in support of their contentions:

1 **N. Sunkanna v. State of Andhra Pradesh (2016) 1 SCC 713**

2 **T.K.Ramesh Kumar v. State Through Police Inspector, Bangalore [(2015)15 SCC 629]**

3 **Khaleel Ahmed v. State of Karnataka [(2015) 16 SCC 350]**

4 **Suraj Mal v. The State (Delhi Administration) [1979 Cri.L.J.1087: AIR 1979 SC 1408]**

5 **Sita Ram v. The State of Rajasthan [1975 Cri.L.J.1224: AIR 1975 SC 1432]**

15 I have gone through the aforesaid judgments. In the case of **N. Sunkanna (Supra)** and **T.K.Ramesh Kumar (Supra)**, reliance was placed on the decision of the Apex Court in the case of **B.Jayraj v. State of A.P (2014) 13 SCC 55** wherein in paragraph 8, it is held as follows:

> *"8.....there is no other evidence to prove that the accused had made any demand, the evidence of P.W.1 and the contents of Ext.P-11 cannot be relied upon to come to the conclusion that the above material furnishes proof of the demand allegedly made by the accused. We are, therefore, inclined to hold that the learned trial court as well as the High Court was not correct in holding the demand alleged to be made by the accused as proved. The only other material available is the recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by the accused himself. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under section 7. The above also will be conclusive insofar as the the offence under Sections 13(1)(d)(i) and (ii) is concerned as in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established."*
>
> *(emphasis supplied)*

16 Thus, in view of the law laid down in the aforesaid two

judgments of the Supreme Court, I am required to answer whether the conviction is sustainable in the absence of demand having not proved by the prosecution. Obvious answer is in negative. I say so because at the first place, the Complainant himself has turned hostile and has not supported the Prosecution. At second place one panch was found to be 'Stock Panch'; and another has turned unfriendly to Prosecution.

Mr. Pednekar the learned APP has attempted to convince this Court, that even, if the complainant has turned hostile, the other evidence on record and particularly that of Investigating Officer being reliable, cogent, there is no impediment to hold that there was a demand by the accused no.1 in-as-much as amount of bribe was accepted by his subordinate i.e. accused no.2 on behalf of accused no.1. Mr. Pednekar, therefore, submitted that once the accused no.2 was found in possession of tainted currency notes then in given eventuality accused was under obligation to explain as to why and under what circumstances, money was found in his possession. Mr. Pednekar would, therefore, submit that explanation given by accused no.2 in his statement under Section 313 of the Cr.P.C. is not plausible, acceptable and reasonable. On these counts, he would support conviction and submits that appeal may

be dismissed.

17 Admittedly, Complainant did not support the case of the prosecution. He was cross-examined after declaring him hostile, but prosecution could not elicit anything from him in support of prosecution. Be that as it may, the fact remains that prosecution ought to have examined Nilkanth (employee of complainant) to whom the alleged demand was made by the accused no.1 at the first instance. After perusing the charge-sheet, I found that Nilkanth has not even cited as witness. There is no explanation as to why Nilkanth was not cited as prosecution witness.

Thus, after going through the evidence of P.W.1, in my view, prosecution has not proved factum of “demand” allegedly made by the accused no.1 as protection money, from the complainant. There is absolutely nothing on record to show that Rs.1,000/- were demanded by accused no.1 from the complainant. Prosecution has equally not examined the landlord Mr. Abdul Rahim whose house was under repairs and was carried out by the complainant. In my view, these are the serious lapses on the part of prosecution. Investigation thus suffered and made the case of the prosecution weak.

18 Thus, in my view, evidence of P.W.1 does not take

prosecution case further to prove a fact that there was demand of Rs.1,000/- by accused no.1 as protection money from the complainant so as to enable him to complete repairing work.

19 P.W.2-Panch Witness is stock witness. In cross-examination this witness has admitted that, he is giving false evidence in this case at the instance of the officers of Anti-Corruption Bureau to implicate the accused no.1. This admission is fatal to prosecution. It needs no further comments. He volunteered before the trial Court that he acted as pancha witness in four ACB cases; He would further say that the Anti-Corruption Bureau should not call him as pancha witness again and again as confusion is created in his mind due to involvement in many cases. It further appears that this pancha witness was not re-examined by the prosecution. Thus, I am left with the evidence of P.W.3-Co-panch. He was a shadow witness. Obviously, he was present only when money was kept in the pocket of accused no.2. In my view, evidence of this witness is of no assistance to the prosecution at all.

20 In the case in hand, money was found in possession of accused no.2 and he attempted to explain it, in his statement under Section 313 of the Cr.P.C. He would say and submit to the Court that when he reached near Hotel Shivsagar, he was called by

his name by the complainant Ayub Shaikh, who happened to be worker of political party, BJP. Thereafter, he had cup of tea with him and suddenly after paying tea charges, Rs.1,000/- were kept in his shirt pocket. Thus, defence of this witness was that, he had been to Hotel Shivsagar accidentally and had a cup of tea with the Complainant; as he was acquainted with him. The explanation appears to be probable for the reason that P.W.2 in his examination-in-chief stated that when the accused no.2 came near the Hotel Shivsagar, the Complainant called him as “Desai Saheb” and Complainant was surprised as to why accused no.2 had come over there. If evidence of P.W.2 is read in juxtaposition with explanation of accused no.2 given under Section 313 of Cr.P.C. , possibility cannot be overruled that he came on the spot (Hotel Shivsagar) accidentally (and not as directed by accused no.1) and was offered a cup of tea by the complainant as he knew him. Thus, in my view, explanation given by accused no.2 is probable in given set of facts. Even otherwise, there is no evidence on record at all to hold that accused no.2 accepted tainted currency notes for and on behalf of accused no.1, in pursuance of demand. In the case in hand Prosecution has not proved foundational facts at all and as such conviction is not sustainable.

21 That so far the recourse taken by the learned trial Court to presumption is concerned, decision of the Apex Court in **State of Punjab v. Madan Mohan Lal Verma (2013) 14 SCC 153** has held, thus;

> *"11 The law on the issue is well settled that demand of illegal gratification is sine-qua-non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act. By bringing on record evidence either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. 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 touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convicting the accused person."*

22 In the case in hand foundational facts; like 'demand of illegal gratification' has not been proved. Prosecution has also not proved that accused no.2 accepted tainted currency notes, for and on behalf of accused no.1.

23 That for the reasons aforesaid, the Appeal is allowed and the conviction recorded in the aforesaid Special Cases is hereby set aside. Bail bonds of the accused are cancelled and sureties are discharged. Fine amount, if paid be refunded to accused.

(SANDEEP K. SHINDE,J.)