

A.F.R
HIGH COURT OF MADHYA PRADESH, JABALPUR
Criminal Appeal No.345/2013

APPELLANT : Krishna Kant Rathod, aged about 35 years, S/o Shri Badrilal Rathod, Senior Clerk, West Central Railway, Jabalpur, presently residing under the care of Shri S.K. Gupta, House No.767, Samiksha Town, Phase-2, Near Jethi Hospital, Kanchghar, Jabalpur, Permanent R/o House No.C-82, Alkapuri Colony, Police Station Industrial Area, Ratlam (M.P)

-Versus-

RESPONDENT : Union of India, through C.B.I., Jabalpur (M.P)

Shri Anil Khare, Senior Advocate with Ms. Pallavi Khare, Advocate for the appellant.

Shri J.K. Jain, Additional Solicitor General of India for the respondent.

PRESENT :Hon'ble Shri Justice S.K. Gangele.
Hon'ble Shri Justice Anurag Shrivastava.

Whether approved for reporting: Yes/No.

J U D G M E N T
(18.07.2017)

Per Anurag Shrivastava, J:-

Feeling aggrieved by the judgment of conviction and order of sentence dated 24.01.2013, passed by Special Judge (C.B.I.) Jabalpur, in Special Case No.03/2009

convicting appellant under Section 7 and Section 13(1)(d) read with Section 13(2) of Prevention of Corruption Act, 1988 (for brevity "the Act") and thereby sentencing him to R.I for one year and fine of Rs.5,000/- and R.I of two years and fine of Rs.5,000/- respectively. In default stipulation the appellant has preferred present appeal under Section 374 (2) of Code of Criminal Procedure, 1973.

- 2.** In brief, the case of prosecution is that at the relevant point of time the appellant/accused Krishna Kant Rathod was posted and working as Senior Clerk under Bhagwan Singh, Assistant Commercial Manager, West Central Railway, Jabalpur. The allotment of emergency quota of berths in the trains was done by Bhagwan Singh and appellant. As per prosecution story the complainant Pawan Singh Thakur and his family were to go to Mumbai for which he had purchased the tickets of sleeper class in train No.2321, which was issued in wait list. Complainant got the information that if requisite number of applications are not received for allotment of berth in emergency quota then the general passengers can get allotment in said quota by making appropriate application to Assistant Commercial Manager of Railway. On this information on 23.12.2007 the complainant went to the Office of Bhagwan Singh who had office in the first floor of the Office of General Manager. The appellant Krishna Kant Rathod also sits in the office-chamber of Bhagwan Singh. Complainant first contacted appellant and as per his direction he met Bhagwan Singh

and asked him for allotment of berths. Bhagwan Singh told him that he would be in a position to allot berth only in AC-Class. He advised him to get another ticket of AC-Class and come by 02:00 P.M for allotment of the berth in emergency quota. Bhagwan Singh further raised a demand of Rs.1000/- and told the complainant that in case if he does not give the bribe amount, the berth would not be confirmed from emergency quota. It is further stated by the complainant that when he came out of the chamber, the present appellant told him that he should come by 02:00 P.M. with Rs.1000/- and AC ticket. Since the complainant was not keen enough to give illegal gratification to the appellant, as a result of which he made a complaint dated 23.12.2007 to Superintendent of Police (C.B.I.) Jabalpur. The S.P. (C.B.I) has instructed Pannir Selvam, Inspector to act as a Trap Laying Officer and Shri Rajeev Sinha was also to conduct the verification of complaint.

- 3.** This is also the case of prosecution that after getting verification done by Rajeev Sinha. An FIR under Section 7 of PC Act, 1988 and 120-B of IPC was registered. Shri Pannir Selvam, Inspector took over the proceedings of trap and summoned two independent witnesses namely Azhar Parvez and Shekhar both were Assistant Manager in Union Bank of India. In order to explain the significance of trap proceedings, TLO arranged a demonstration of sodium carbonate -phenolphthalein powder reaction in plain water.

The currency note of Rs.1000/- produced by complainant was treated with phenolphthalein powder and thereafter was kept in the left side chest pocket of shirt of complainant and a pre trap memorandum was prepared. The complainant was directed not to touch the currency note unless the accused demanded for the same. Azhar Parvez was instructed to act as a shadow witness to oversee the transaction and conversion.

- 4.** It is further the case of prosecution that after pre-trap proceeding, the trap team left for the Office of General Manager, West Central Railway Jabalpur and reached there at about 14:20 Hours. The complainant and shadow witness entered in the Office of the accused, at about 14:25 hours. At about 14:45 hours, shadow witness came out of the office and gave the pre-arranged signal, seeing this TLO Pannir Selvam and other team members rushed into the chamber of appellant where the complainant told them that Bhagwan Singh had directed him to pay the bribe of Rs.1000/- to the present appellant who accepted the said currency note with his right hand and had kept the same in green diary, which was kept on the Office table of the appellant K.K. Rathod. The TLO revealed his identity and identity of other team members and recovered the tainted currency note from the diary. The hands of Bhagwan Singh was treated with solution of Sodium Carbonate but no change in the colour was found whereas on washing the hand of appellant in the sodium carbonate

solution, the color of solution turned pink. The solution were kept in bottles and sealed. Memorandum and panchanama of entire trap proceedings was prepared and Spot map was also prepared and after conducting other necessary investigation and getting sanction the charge sheet was submitted before Special Judge.

- 5.** The trial Court has framed the charge for offences under Section 7 and 13(1)(d) and 13(2) of Prevention of Corruption Act, 1988. The appellant abjured guilt, thereafter prosecution has examined 10 witnesses whereas appellant has not examined any witnesses in his defense.

- 6.** In his defense the appellant has denied the allegations that he has demanded bribe from complainant for allotment of emergency quota of berth in train. It is stated by him that he has been falsely implicated at the instance of the C.B.I officers who always used to pressurize him to get the berth sanctioned through the emergency quota. It was also contended by the appellant that he had neither demanded nor accepted any illegal gratification from Pawn Kumar Thakur. The explanation in respect to change of colour was well given by him. It was also stated by the appellant that his defence was established by the prosecution witnesses themselves namely Pawan Singh Thakur, Azhar Parvez and Shekhar.

- 7.** Learned trial Court after appreciating and marshaling the evidence found the appellant guilty under Section 7 and 13(1)(d) and 13(2) of Prevention of Corruption Act, and sentenced him, which we have mentioned hereinabove.
- 8.** It is argued by the learned counsel for the appellant that there is no evidence available on record to show that the appellant has made the demand of illegal gratification from the complainant for allotment of emergency quota. Trial Court has failed to consider the evidence of complainant Pawan Singh who has clearly stated that neither the appellant has demanded any money from him for the allotment of the berth nor he had given him Rs.1000/- for the same. The tainted money was recovered from diary kept in office table of the appellant and it is also admitted by the complainant that he had kept that money in the diary on the direction of Bhagwan Singh. The shadow witness has also been declared hostile and did not support the prosecution. The trial Court has failed to take into account the evidence of demand and acceptance has not been corroborated by the independent witnesses (PW-4) and (PW-5). The trial Court has erroneously taken into consideration the provisions of presumption as contemplated under Section 20 of the Act. The presumption can only be drawn when prosecution prove his case within the parameters of Section 7 of the Act. More so, the said presumption is rebuttable one and burden can be discharged by preponderance of probability.

The trial Court has failed to consider that the appellant was merely a clerk who was assisting in various proceedings of emergency quota. He was not the sanctioning authority in respect to allotment of berth from the emergency quota. The defense of appellant has been clearly established by the prosecution itself. The alleged offence is not proved beyond reasonable doubt against him. Therefore, he may be acquitted.

- 9.** Learned counsel for the C.B.I has supported the findings of the trial Court and submitted that the tainted money was recovered from the possession of the appellant. It is proved that he had received the money, therefore, trial Court has rightly drawn the presumption under Section 20 of the Act. This presumption is not rebutted. Therefore, the trial Court has rightly held appellant guilty and convicted under alleged offence.

- 10.** Considering the rival contention of the learned counsel for the parties and on perusal of the record and particularly the statement of appellant under Section 313 of Cr.P.C., it is not disputed that at the relevant time the appellant was posted as Senior Clerk under Bhagwan Singh, Assistant Commercial Manager, West Central Railway, Jabalpur. Bhagwan Singh was authorized to make allotment of berths in various trains under emergency quota. The appellant was working as Dealing Clerk in this regard. It is also not disputed that on 23.12.2007 the complainant

Pawan Singh came in the chamber of Bhagwan Singh for seeking allotment of berth. He had a talk with Bhagwan Singh and thereafter again he came and gave the tickets (Ex.P/17) and requisition form (Ex.P/18) for allotment of berth in emergency quota to him . Complainant had ticket of AC-II Class of train No.2321 for Jabalpur to Mumbai. It is also not disputed that soon after the allotment of berth C.B.I. Inspector Pannir Selvam alongwith other witnesses PW-3, PW-4 , PW-5 raided the chamber of Bhagwan Singh, made search of appellant and Bhagwan Singh and sodium carbonate test was conducted on the hands of the appellant as well as on the diary. Both tests proved to be positive.

- 11.** In this appeal the main question arises for consideration is whether the appellant has made demand of illegal gratification and whether he has received the money against said demand. Hon'ble Apex Court in case law **N. Sunkanna Vs. State of A.P. (2016) 1 SCC 713** held as under:-

"It is settled law that mere possession and recovery of currency notes from accused without proof of demand will not bring home the offender under Section 7, since demand of illegal gratification is sine quo non to constitute the said offence. The above also will be conclusive in so far as the offence under Section 13 (1)(d) 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."

Thus the burden to prove the accusation against the appellant for the offence punishable u/s 7 r/w 13(1)(d) of the Act with regard to acceptance of illegal gratification from the complainant PW-3 Pawan Singh, lies on the prosecution.

- 12.** In the present case complainant Pawan Singh Thakur (PW-3) deposed that on 23.12.2007 he was going to Mumbai with his family. He had two tickets of sleeper class in waiting list. He went to Office of Chief Commercial Manager, situated on Platform No.4 of Railway station Jabalpur for allotment of berths in emergency quota. In the Office-chamber of A.C.M Bhagwan Singh he met the Senior Clerk appellant K.K. Rathod who was also sitting in the chamber and asked him for allotment of berths. Appellant told the complainant to contact A.C.M Bhagwan Singh who was sitting in the chamber. The complainant contacted Bhagwan Singh and requested him for allotment of emergency quota, he told him that the berths of AC Class can only be allotted under emergency quota, therefore, if complainant wants berths he has to purchase AC tickets and he has to pay Rs.1000/- extra for allotment. As the complainant was not keen to pay illegal gratification he went to C.B.I Office and lodged the report, and thereafter a trap was arranged. It is further deposed by complainant (PW-3) that as per direction of C.B.I. Inspector Pannir

Selvam he alongwith shadow witness Azhar Parvez (PW-4) went to the Office of A.C.M Bhagwan Singh. The Office Peon sitting on the door stopped Azhar Parvez there and only allowed complainant to enter in the Office. He showed the tickets of AC Class and application form for allotment of berths to appellant, he told the complainant to correct the PNR number written in the application form and produce it before Bhagwan Singh who was sitting in his Office chair. The complainant wrote the correct PNR number on the application and produce it with the ticket and tainted Rs.1000/- before Bhagwan Singh. At this time appellant had gone out of the chamber. After going through the application and tickets Bhagwan Singh told him that your tickets has been now confirmed and directed him to place the money inside the diary, which is kept on the Office table of the appellant. Thereafter appellant came out of the Office and gave pre-arranged single to C.B.I. team. A raid was laid thereafter and the tainted money was recovered from the diary. The C.B.I. Inspector Pannir Selvam conducted sodium carbonate test by washing the hands of Bhagwan Singh and appellate in which the test in respect of appellant was found positive. The complainant Pawan Singh Thakur (PW-3) has also admitted that he had given the written complaint (Ex.P/10) and he had signed post-trap memorandum (Ex.P/12).

- 13.** In close scrutiny of evidence of complainant (PW-3) it is found that in his examination in chief he had stated that

demand of Rs.1000/- as illegal gratification was raised by Bhagwan Singh. He did not say that the appellant had raised any demand. This witness has been declared hostile by the prosecution and cross-examined elaborately. In cross-examination paragraph No.22 the complainant has categorically stated that in C.B.I. Office he had never disclosed to the C.B.I. about the appellant raising any demand of illegal gratification. He had informed only against Bhagwan Singh but C.B.I. Officer told him to add the name of appellant also in the complaint as they already have grievances against appellant. Thus, the complainant does not support the contents of complaint (Ex.P/10) in respect of appellant.

- 14.** The complainant Pawan Singh (PW-3) in para No.19 further deposed that at the time of incident, form for allotment of the berth was filled up by him and was taken to Bhagwan Singh, who after seeing the money, told him to give Rs.1000/- alongwith application form to appellant. The complainant kept Rs.1000/- denomination between ticket and application form and gave it to appellant. The appellant on seeing the currency note enquired about the same and told the appellant to correct the PNR number written on application form and returned the currency note to him. In cross-examination para Nos.24 and 25 the complainant further stated that after seeing the currency note inside the application form, appellant enquired about it. When complainant told him that Bhagwan Singh had

directed him to give this money to the him, the appellant refused to accept the money and told him that he had never demanded any money from him, and the money be given to the person who had made demand and thereafter appellant returned the money to complainant. Then again complainant went to Bhagwan Singh after writing down the correct PNR number on the application, and told him that the appellant is not accepting the money then Bhagwan Singh told him to keep the money in the diary kept on the table of appellant and place the diary inside the drawers of table. In para No.4 the complainant had deposed that at the time when he was keeping money in the diary the appellant was not present in the Office chamber. In cross-examination para No.30 also the complainant had stated that the appellant had neither made any demand of illegal gratification nor he had accepted it.

15. The shadow witness Azhar Parvez (PW-4) deposed that at the time of trap he went with complainant Pawn Singh Thakur and trap party to the C.C.M Office, situated on Plateform No.4 of Railway Station. The complainant went to the Office of A.C.M. and Azhar Parvez and other members of trap party were kept waiting for the signal of complainant on Plateform No.4. This witness has been declared hostile by the prosecution. He has denied that he had accompanied the complainant to the chamber of Bhagwan Singh and before him the complainant had given money to appellant. He has stated ignorance about the

incident which took place inside the chamber of Bhagwan Singh. Thus, this witness does not support the prosecution about the demand of illegal gratification and acceptance by appellant.

- 16.** Another independent witness Shekhar Kumar (PW-5) is also declared hostile. He had deposed that at the time of trap he alongwith other witness Azhar Parvez were waiting on the Platform No.4 when complainant went inside the Office of A.C.M. He did not know whether the appellant had made any demand of illegal gratification or accepted it.
- 17.** Other witnesses Raju Kumar Sinha (PW-7) and Pannir Selvam (PW-8) are the C.B.I. Inspectors. Although, they have verified the complaint and trap proceeding in their evidence but they are not eye witness of demand of illegal gratification and its acceptance. Raju Kumar Sinha (PW-7) has admitted that he had not made any preliminary enquiry about veracity of complaint (Ex.P/10). Investigation officer Pannir Selvam (PW-8) has admitted that before laying the trap proceeding neither the conversation between appellant and complainant was got recorded nor any verification of complaint was done.
- 18.** Thus, in the present case only the evidence of complainant Pawan Singh Thakur (PW-3) is available to show that the appellant has demanded Rs.1000/- as illegal gratification for allotment of emergency quota of berth and after

receiving amount the berth was allotted to him. The complainant (PW-3) has not supported the prosecution in this regard and has been declared hostile. Considering his entire statement it is found that, he has categorically denied that the appellant had made any demand of illegal gratification for allotment of berth from him. His statement shows that the demand was raised by Bhagwan Singh. When complainant tried to give him money the appellant refused to take the money and returned it to complainant. Thereafter, the complainant kept the money in the diary under the direction of Bhagwan Singh in the absence of appellant. The diary was kept inside the drawaz of table by complainant himself. This shows that the appellant was not knowing the fact that the money was kept inside the diary, therefore, it cannot be presumed that the appellant was in conscious possession of the money. The explanation offered by the appellant regarding sodium carbonate test is also acceptable. The complainant himself had stated that he had kept the note of Rs.1000/- denomination in between the application form and ticket. Naturally when these are handed over to appellant he would have touched the note while going through the PNR number mentioned in ticket and application form. Complainant had stated that the appellant had held the application form and the currency with his right hand and returned the said currency note with his left hand. He refused to take money as illegal gratification. During this act he came in contact with

tainted note. Thus, the defense of appellant is duly established by the evidence of complainant (PW-3).

- 19.** Hon'ble Supreme Court in case law State of ***Punjab v. Madan Mohan Lal Verma 2013 Cr.L.J.4050*** observed as under:-

"The law in issue is well settled that demand of illegal gratification is sine quo non for constituting an offence under the Act 1988. 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 the 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 sec.20 of the Act 1988, 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 sec.7 of the Act 1988. While invoking the provisions of sec.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. However, before the accused is called upon to explain how the amount in question is found in his possession, the foundational fact must be proved 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 interested witness. In a proper case the Court may look for independent corroboration."

20. Hon'ble Apex Court in case law ***T.K. Ramesh Kumar Vs. State through Police Inspector Banglore (2015) 15 SCC 629*** in para No.12 observed as under:-

"12. In this regard it would be appropriate for this Court to refer to the decision of this Court in the case of ***Mukut Bihari & Anr. v. State of Rajasthan, 2012(3) R.C.R.(Criminal) 980 : 2012(4) Recent Apex Judgments (R.A.J.) 206 : (2012)11 SCC 642***, which reads 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 the 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 bribe. Mere receipt of amount by the accused is not sufficient to fasten the guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification, but 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 the touchstone of proof beyond all reasonable doubt. However, before 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. 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 and in a proper case the court may look for independent corroboration before convicting the accused person."

- 21.** Thus the accused is not required to prove his defense beyond reasonable doubt, but it is to be proved by preponderance of probability. In the present case, considering the evidence adduced by both parties it appears that the complainant had kept the amount Rs.1000/- in the diary on the direction of Bhagwan Singh. Actually the appellant has not made any demand or accepted illegal gratification. As per complainant the demand was made by Bhagwan Singh.

- 22.** Learned trial Court relying upon the some part of statement made by complainant in cross-examination held that the demand of illegal gratification for allotment of emergency quota was made by appellant. The trial Court had relied upon the case law *Khujji alias Surendra Tiwari Vs. State of M.P.* AIR 1991 SC 1853. In this case law the complainant deposed against the accused in his examination in chief, then his cross-examination was deferred for long time on the request of defense counsel. Later-on, when he was cross-examined in Court he turned hostile and denied his earlier statement made in

examination in chief. In this circumstance Hon'ble Apex Court had relied upon the statement of witness made during examination in chief. In the present case the complainant in his examination in chief has categorically denied the fact that the appellant has made any demand of illegal gratification for allotment of berth and accepted it. He has also denied to make a complaint against appellant. This is a settled law that the entire evidence of a witness has to be considered before arriving at any conclusion or drawing any inference on the basis of it. A part of statement cannot be picked up to draw any conclusion. The statement of witness made before the Court is substantive evidence. The complaint and other memorandum of trap are only corroborative evidence. In view of material discrepancies in the statement of complainant, his statement cannot be believed beyond reasonable doubt. There is no other evidence to prove that the accused had made any demand. The complaint (Ex.P/10) and memorandum (Ex.P/11 and P/12) cannot be relied upon to come to the conclusion that the above material furnishes to proof of the demand allegedly made by the accused. We are, therefore, inclined to hold that the learned trial Court was not correct in holding the demand alleged to be made by the accused as proved.

- 23.** In case law ***B. Jayraj v. State of A.P. (2014)13 SCC 55 :AIR 2014 SC (supp)1837*** the complainant turned hostile, there was no other witnesses present at the time

of transaction between complainant and appellant. The complainant disowned the contents of his complaint. In these set of facts Hon'ble Apex Court has observed "when complainant disowned his own statement the contents of complaint cannot be relied on". Hon'ble Apex Court further observed as under:-

"The only material available is the recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by accused himself. Mere possession and recovery of currency notes from the accused without proof of demand will not bring home the offence under sec.7. The above also will be conclusive in so far as the offence u/s 13 (1)(d)(1) and (2) is concerned as in the absence of prove of any demand for illegal gratification the use of corrupt or illegal means or abuse of position as public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established."

24. From above discussion we are of the opinion, that the case, set up by the accused-appellant must be accepted and it must be held that the accused-appellant has successfully rebutted the presumption drawn against him under sec.4 of the Act by preponderance of probability and the finding recorded by the learned Trial Court in this regard is not sustainable. It is not proved that appellant had received money from complainant as bribe or illegal gratification. The prosecution has failed to establish the guilt of appellant-accused for the offences under Section 7 and 13(1)(d) and 13(2) of Prevention of Corruption Act.

25. Hence the appeal is allowed, the impugned conviction and sentence imposed by Trial Court is hereby set aside and appellant is acquitted of the charges for offence punishable 7 and 13(1)(d) and 13(2) of Prevention of Corruption Act, his bail bonds stand discharged, the fine deposited by appellant be returned to him after period of appeal, if no order is passed otherwise in it.

(S.K. Gangele)
Judge

(Anurag Shrivastava)
Judge

Vin**