

(2024) 09 BOM CK 0028

In the Bombay High Court

Case No : Criminal Appeal No.451 Of 2009

Devidas S/O Jagannath Joshi

APPELLANT

Vs

State Of Maharashtra Thr. Dy.S.P. A.C.B. Sleuth, Nagpur

RESPONDENT

Date of Decision : 20-09-2024

Acts Referred:

Constitution of India, 1950 — Article 21

Code of Criminal Procedure, 1973 — Section 386, 386(a), 386(b), 386(b)(i)

Prevention of Corruption Act, 1988 — Section 7, 13(1)(d), 13(2)

Citation : (2024) 09 BOM CK 0028

Hon'ble Judges : Urmila Joshi Phalke, J

Bench : Single Bench

Advocate : S.A.Brahme, K.R.Lule

Final Decision : Disposed Of

Judgement

Urmila Joshi Phalke, J.

1. By this appeal, the appellant (the accused) has challenged judgment and order dated 4.9.2009 passed by learned Judge, Special Court (ACB), Nagpur (learned Judge of the Special Court) in Special Case No.7/2002.

2. By the said judgment impugned, the accused is convicted for offence punishable under Section 7 of the Prevention of Corruption Act, 1988 (the said Act) and sentenced to undergo rigorous imprisonment for three years and to pay fine Rs.10,000/-, in default, to undergo simple imprisonment for three months.

He is further convicted for offence punishable under Section 13(1)(d) read with 13(2) of the said Act and sentenced to undergo rigorous imprisonment for three years and to pay fine Rs.10,000/-, in default, to undergo simple imprisonment for three months.

Learned Judge of the Special Court directed that all sentences shall run concurrently.

3. Brief facts of the prosecution case are as under:

The accused was working as Sectional Engineer/Sub Divisional Officer in Minor Irrigation Department. In the year 2000, Suresh Ramteke (the complainant) was also working as Sectional Engineer in the said department and posted at Kuhi. During the period from 1986 to 2000, he was Incharge of the Section of village Mansar. The accused was deputed on transfer to the post of the Deputy Engineer in the Minor Irrigation Sub Division. In the month of June 2000, the complainant was transferred from Ramtek Sub Division to Kuhi Sub Division. On 29.8.2000, his associate Rameshkumar Gupta visited the complainant and gave a message that he along with the complainant were called by the accused at his residence at Nagpur. They visited the accused at his residence. The accused informed them that while discharging official work at Ramtek, they committed various irregularities and misappropriated huge amount and, therefore, an enquiry would be initiated against them. As per allegations, the accused demanded Rs.1,50,000/- from each of them for stalling the enquiry and extending his cooperation in favour of them. The complainant and Rameshkumar Gupta showed their inability to pay the amount on which the accused threatened them that if they do not pay the amount, they would meet consequences of suspension or dismissal from services. The complainant, therefore, agreed to give gratification amount. On 8.9.2000, the accused made a telephonic call to the complainant and called him at his residence. He shown the complainant a photocopy of a complaint filed by one Kothekar on 6.9.2000 regarding official dereliction in duty. The Nagpur Zilla Parishad had also established one enquiry. The accused asked the complainant to pay the amount within 15-20-days. On 29.9.2000, again the complainant received a phone call of the accused who enquired about the amount. On which, the complainant and Rameshkumar Gupta arranged cash Rs.3.00 lacs. However, as the complainant and Rameshkumar Gupta were not intending to pay the amount, they approached the office of the Anti Corruption Bureau at Nagpur (the bureau) and lodged a complaint.

4. After receipt of the complaint, the trap officer called two panchas. In presence of panchas, the complainant narrated the entire episode and panchas also verified the same from contents of the First Information Report. The complainant produced currency notes in six bundles and after explaining characteristics of phenolphthalein powder and sodium carbonate, solution was applied on the said tainted notes. The complainant and pancha No.1 were instructed. As per instructions, the complainant was asked not to hand over the amount unless it is demanded and pancha No.1 was asked to remain along with the complainant and observe events between the complainant and the accused for which pancha No.1 gave his consent. Accordingly, pre-trap panchanama was drawn.

5. After the pre-trap panchanama, the complainant and pancha No.1 proceeded along with other raiding party members towards the house of the accused. He along with pancha visited the house of the accused and during communication, the accused demanded the amount and the complainant handed over the same.

The accused accepted the said amount and kept inside a room and, thereafter, a predetermined signal was given.

The accused was caught and tainted notes were recovered from his house. Accordingly, post-trap panchanama was drawn. During the post trap panchanamas, hand wash of the accused as well as the complainant was collected. The sanction was obtained and after completion of investigation, chargesheet was filed against the accused.

6. To substantiate contentions, the prosecution examined in all five witnesses namely Suresh s/o Ramdasji Ramteke vide Exhibit-20 (PW1), the complainant; Rameshkumar Gupta vide Exhibit-43 (PW2), Mahadev Rahane vide Exhibit-44 (PW3), the Shadow Pancha; Nilima Chimote vide Exhibit-49 (PW4), the Clerk; and Anil Bobade vide Exhibit-51 (PW5), the Trap Officer.

7. The accused also examined himself as DW1.

8. Besides the oral evidence, the prosecution further relied upon complaint Exhibit-21, certificate of loan obtained by the complainant Exhibit-22, letter by Tulshiram Kothekar raising grievance against the complainant Exhibit-23, seizure memo Exhibit-25, letter to complainant to submit Audit Statement Exhibit-27, letter to Kothekar who made the complaint against the complainant Exhibit-28, pre-trap panchanama Exhibit-45, post-trap panchanama Exhibit-46, seizure memo Exhibits-54 and 55, map Exhibit-56, complaint Exhibit-56, confidential letter to the complainant and Rameshkumar Gupta Exhibit-58.

9. After considering the evidence adduced during the trial, learned Judge of the Special Court held that the sanction accorded by the prosecution is a valid sanction. The evidence of the complainant and Rameshkumar Gupta sufficiently shows involvement of the accused in accepting remuneration otherwise than his salary and thereby committed the offence and, therefore, he is convicted.

10. Being aggrieved and dissatisfied with the judgment impugned, the appeal is preferred mainly on grounds that the trial conducted before learned Judge of the Special court is not a fair trial. No opportunity is granted to the accused to engage a counsel of his choice and without an opportunity of hearing, the accused was convicted. The accused was not having any legal assistance during the trial and, therefore, the trial conducted is against the principles of natural justice. As such, the judgment impugned deserves to be quashed and set aside. It is further submitted that the sanction was not proved by the prosecution by examining Sanctioning Authority Mrs.Madhuri Talasikar. Thus, the entire evidence on record sufficiently shows that in absence of opportunity, the entire judgment impugned deserves to be quashed and set aside.

11. Heard learned counsel Shri S.A.Bramhe for the accused and learned Additional Public Prosecutor Shri K.R.Lule for the State.

12. Learned counsel for the accused submitted that though the accused engaged a counsel to conduct the trial, his counsel did not turn up and the accused was

insisted to cross examine witnesses. It is well settled that accused is to be treated as an innocent, till guilt is proved. Perusal of the evidence shows that the accused, who is not law graduate or having thorough knowledge of law, was insisted to take cross examination and thereby prejudice is caused to the accused. There was absolutely no fair trial and sufficient opportunity was not granted to the accused to prepare for his defence and conduct the trial. The sanction was also not proved as Sanctioning Authority is not examined. The evidence of the Clerk Nilima Chimote is only to extent that she identified signature of the Sanctioning Authority. Thus, contents of the sanction order are not proved. The sanction order was executed to the extent of signature of the accused. Thus, a fair opportunity was not granted, which caused prejudice to the accused and, therefore, the judgment impugned deserves to be set aside.

13. In support of his contentions, learned counsel for the accused placed reliance on following decisions:

1. Mohd.Hussain alias Zulfikar Ali vs. State (Government of NCT of Delhi) (2012)2 SCC 584;
2. Nasib Singh vs. State of Punjab and anr (2022)2 SCC 89;
3. Ajay Kumar Ghoshal and ors vs. State of Bihar and anr (2017)12 SCC 699, and
4. Criminal Appeal No.424/2016 (Sanjay s/o Wasudeo Chinchmalatpure vs. State of Maharashtra, through Anti Corruption Bureau, Nagpur) decided by this court on 5.7.2024.

14. Per contra, learned Additional Public Prosecutor for the State supported the judgment impugned and submitted that learned Judge of the Special Court rightly considered the issue of sanction and rightly observed the evidence of Sanctioning Authority. The court shall presume that such order was also placed before the Honourable Chief Minister or the Deputy Chief Minister and, thereafter, the sanction order was issued. The court shall presume that rules of business were followed and necessary permission of the Honourable Chief Minister or the Deputy Chief Minister was obtained and, therefore, the court shall presume that the sanction order was passed in accordance with normal rules of business. The demand and acceptance is also proved by the prosecution. In view of that, the appeal is devoid of merits and liable to dismissed.

15. I have heard learned counsel for parties and perused record.

16. Learned counsel for the accused raised an issue that the sanction was not proved and contents of the sanction order were also not proved. Thus, validity of the sanction has been raised in the appeal.

17. Undisputedly, the sanction order was issued by Mrs.Madhuri Talasikar, Deputy Secretary in Mantralaya deputed during the period from 2001-2004. The said Deputy Secretary was not examined by the prosecution. One Nilima Chimote was examined whose evidence is only to the extent that she was working as Clerk

under the said Deputy Secretary. She acquainted with her signature and signature on the sanction order is of the said Deputy Secretary. As far as non-examination of the said Deputy Secretary is concerned, no plausible explanation was put forth by the prosecution behind her non-examination. The contents of the sanction order were also not proved by the prosecution.

18. Whether sanction is valid or not and when it can be called as valid, the same is settled by various decisions of the Honourable Apex Court as well as this court.

19. The Honourable Apex in the case of Mohd.Iqbal Ahmad vs. State of Andhra Pradesh 1979 AIR 677 has held that what the Court has to see is whether or not the sanctioning authority at the time of giving the sanction was aware of the facts constituting the offence and applied its mind for the same and any subsequent fact coming into existence after the resolution had 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.

20. The Honourable Apex Court, in another decision, in the case of CBI vs. Ashok Kumar Agrawal 2014 Cri.L.J.930, has held that sanction lifts the bar for prosecution and, therefore, it is not an acrimonious exercise but a solemn and sacrosanct act which affords protection to the government servant against frivolous prosecution. There is an obligation on the sanctioning authority to discharge its duty to give or withhold sanction only after having full knowledge of the material facts of the case. 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. It has been further held by the Honourable Apex Court that 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. 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. 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. 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. 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.

21. The Honourable Apex Court, in the case of State of Karnataka vs. Ameerjan

(2007)¹¹ SCC 273, held that it is true that an order of sanction should not be construed in a pedantic manner. But, it is also well settled that the purpose for which an order of sanction is required to be passed should always be borne in mind. Ordinarily, the sanctioning authority is the best person to judge as to whether the public servant concerned should receive the protection under the Act by refusing to accord sanction for his prosecution or not. For the aforementioned purpose, indisputably, application of mind on the part of the sanctioning authority is imperative. The order granting sanction must be demonstrative of the fact that there had been proper application of mind on the part of the sanctioning authority.

22. Insofar as the sanction order is concerned, it is mentioned in it that the Government of Maharashtra, having fully examined material before it and considered all facts and circumstances disclosed therein, it is satisfied that a prima facie case is made out against accused and the accused should be prosecuted and the sanction was accorded. Perusal of the sanction order nowhere shows that on what basis the Sanctioning Authority came to conclusion that the sanction has to be accorded. The sanction order only shows that the Government of Maharashtra applied its mind and accorded the sanction. The sanction order discloses that the material was examined by the Government of Maharashtra for according the sanction and satisfaction for according the sanction was also arrived by the Government. The sanction order does not specifically name any officer who had actually undertaken exercise of examining the material and recording subjective satisfaction in this regard on behalf of the Government of Maharashtra. It is not known as to who applied mind and by what process exactly an opinion was formed that a prima facie case was made out for according the sanction.

23. Admittedly, grant of sanction is a serious exercise of power by the competent authority. It has to be apprised of all the relevant materials and on such materials the authority has to take a conscious decision as to whether the facts would show the commission of the offence under the relevant provisions. No doubt, elaborate discussion is not required, however, the decision making on relevant materials should be reflected in the order.

24. The observations of learned Judge of the Special Court, that the accused being Class-I Officer is removable by the Government of Maharashtra under a seal of the Governor; whether prior consent of the Honourable Chief Minister and the Honourable Deputy Chief Minister is taken or not, cannot be questioned, and if the matter is processed in accordance with rules of business, the court shall presume that rules of business were followed, are erroneous observations.

25. It is well settled that sanction is to be accorded after application of mind and in the present case, the sanction order nowhere reflects who applied mind and which documents are considered by the Sanctioning Authority and on what basis the Sanctioning Authority came to conclusion that the sanction is to be accorded to launch prosecution against the accused. There is no finding by learned Judge

of the Special Court as to validity of the sanction.

26. Besides the issue of sanction, to substantiate allegations that the accused demanded the amount and accepted the same, the prosecution placed reliance on the evidence of complainant PW1 Suresh Ramteke; PW2 Rameshkumar Gupta, and Shadow Pancha PW3 Mahadev Rahane.

27. The evidence of complainant PW1 Suresh Ramteke shows that first demand was made to him by the accused on 30.8.2000 at about 10 am when he had been to the house of the accused and, thereafter, by telephonic communication, demands were made on 6.9.2000, 8.9.2000, and 29.9.2000 and, therefore, he approached the office of the bureau on 30.9.2000. As per his evidence, on the day of the trap, he and PW2 Rameshkumar Gupta reached the office of the bureau and produced tainted notes. After completing formality of pre-trap panchanama, amount was kept in one bag and they were instructed to hand over the amount if the demand was made. Accordingly, they both along with panchas, approached the accused at his house. During communication, the accused demanded the amount and accepted the same. His evidence shows that while communicating with the accused, he asked about meeting scheduled at Ramtek. Thereafter, the accused disclosed to him that he had issued notice to Shri Kothekar, who made complaint against the complainant. Thereafter, the accused went inside and brought some papers and handed over the same to the complainant for verification. The accused promised them that he would show favour to them and demanded the amount. Accordingly, the amount was handed over, which was in a bag. The accused accepted the said amount and kept inside his house. Thereafter, the complainant demanded the cotton bag from the accused on a pretext that it belongs to somebody else. Thereafter, the accused transferred the amount in a polythene bag and returned the cotton bag. After accepting the amount, a pre-determined signal was given to other raiding party members. The trap officer came and arrested the accused. From the house of the accused, the amount was seized. The hand wash of the complainant was collected.

28. Complainant PW1 Suresh Ramteke, during cross examination, admitted that he was posted at Ramtek as Sectional Engineer and at the relevant time, one Assistant Engineer Shri S.V.Kale was his superior. It further came in his evidence that he received letter from the accused on 22.8.2000 whereby he was asked details about expenditure etc. It further came in his evidence that he has not furnished any details of advance received by him from his office nor furnished any completion certificate of construction site as required by the accused. He further admitted that he had received funds in advance for construction works. He further admitted that he has not visited the accused along with Shri Rameshkumar Gupta.

29. Thus, an attempt was made as one Shri Kothekar made a complaint against the complainant regarding irregularities and illegalities committed by him while carrying out construction work and misappropriation of amount by using sub

standard material, a notice was issued to the complainant as well as Rameshkumar Gupta to submit Audit Statement and action was proposed against the complainant and Rameshkumar Gupta and, therefore, the accused was implicated by handing over the amount on pretext that certain amount was lying with them under AEGS Scheme and they would refund that amount to him along with papers. Accordingly, the companion came with a bag containing the cash and handed over the same. He accepted the amount under the impression that if amount remained to be unpaid under the AEGS Scheme, he has to refund the same along with papers.

It reveals from the cross examination that in view of oral request of defence counsel, further cross examination was deferred and, thereafter, advocate for the accused did not turn up and the accused declined to cross examine. The cross examination was closed and the witness was discharged.

30. To substantiate allegations and to corroborate the same, PW2 Rameshkumar Gupta was also examined. As far as his evidence on aspect of demand and acceptance is concerned, it shows that the same is consistent with the evidence of complainant PW1 Suresh Ramteke that the accused informed him to come along with the complainant at his house on which the complainant and Rameshkumar Gupta went at the house of the accused. The accused repeated that they have carried out sub standard work and an enquiry is likely to be initiated against them and demanded amount Rs.1,50,000/- from each of them to avoid the action. Rameshkumar Gupta has shown his inability to pay such amount, on which the accused shown his anguish and asked the complainant not to bring Rameshkumar Gupta along with him. Thereafter, on 8.9.2000, the complainant informed him that the accused called him at his residence. Accordingly, they went at the residence of the accused. The accused shown them complaint by Kothekar and demanded Rs.1,50,000/- from each of them. On 29.9.2000 also, the complainant informed him that he received call from the accused who demanded the amount and called them on the next date with the amount. The cross examination of this witness also shows that the Chief Executive Officer of the Zilla Parishad formed a fact finding committee as to allegations of misappropriation of amount of Rs.7.00 lacs to 70.00 lacs. He further admitted that he was departmentally chargesheeted for recovery of Rs.1,63,000/- from him. The chargesheet was filed against one Shri Mate for recovery of Rs.2,17,000/-.

Thus, the evidence of this witness also shows that the demand was made from him for stalling the enquiry which was likely to be initiated against him and the complainant.

31. Document Exhibit-27 shows that a letter was issued by the accused to complainant PW1 Suresh Ramteke/PW2 Rameshkumar Gupta asking them to submit Audit Statements of Advanced Amount taken for construction of storage dam under Assured Employment Guarantee Scheme and completion certificate of storage dams. Document Exhibit-23 is the complaint filed by one Tulsiram

Kothekar alleging that complainant and PW2 Rameshkumar Gupta committed various illegalities and irregularities while carrying out construction and misappropriated the amount with the help of other officials and requested for an action.

32. It appears from the record that the accused was not represented by his Advocate. Initially, he showed his disinclination to cross examine complainant PW1 Suresh Ramteke and, therefore, no cross order was passed. At 4:45 pm, the accused requested to permit him to cross examine the said witness and accordingly, he was permitted to cross examine. Thus, record shows that the cross examination of the complainant was also incomplete as Advocate for the accused failed to appear and cross examine the witness. The accused was asked to cross examine the witness, but he declined.

33. To corroborate the version of complainant PW1 Suresh Ramteke, the prosecution examined Shadow Pancha PW3 Mahadev Rahane. His evidence shows that his superior officer asked him to attend the office of the bureau along with other pancha and, therefore, he was present in the office of the bureau. The complaint of the complainant was read over to him and, thereafter, the officer applied solution to the currency which were Rs.3.00 lacs in number. It was pretended that the complainant received injury and he was along with the complainant to assist him. They approached the accused at his house. Initially, the accused was not present and it was informed that he would return after half an hour. Thereafter, they again went at the house of the accused. The accused was present at his house. There was communication between the accused and the complainant about official work. The accused asked the complainant as to what happened about his work and the complainant handed over bag of amount Rs.3.00 lacs to the accused by disclosing that he arranged the amount. The accused took the bag inside the house. On demand by the complainant to return the cotton bag, the entire amount was kept in a polythene bag by the accused and, thereafter, the pancha gave a signal. On receipt of the signal, the accused was caught. The hand wash of the accused was collected. Accordingly, post-trap panchanama was drawn. His evidence further shows that during house search of the accused, some amount was seized. This witness was also cross examined by the accused and during cross examination, he admitted that when they visited the house of the complainant, the work of painting and white wash at his house was going on. Some of household articles were kept in opposite flat. He further admitted that the accused voluntarily informed that cash found in suit case was in connection with the office work. At the relevant time, PW2 Rameshkumar Gupta was not along with them. He further stated that he is unable to recollect whether tainted currency notes were stapled or wrapped by the rubber band. This witness is also cross examined by the accused. Thus, it reveals that consistently the accused was not represented by any counsel. Initially, though there was request for adjournment, the same was not considered.

34. PW5 Anil Bobade is the Trap Officer, who narrated about procedure carried

out by him before and after the trap. As far as his evidence is concerned, he is not witness on demand and acceptance. His evidence is only to the extent that the amount was recovered from the house of the accused. The note recorded by learned Judge of the Special Court shows that Advocate for the accused left the court as if he was refrained from defending the accused.

During cross examination of the Trap Officer also, it came on record that at the time of the raid, the accused informed him that some of household articles were kept by him in a flat opposite to his flat belonging to one Pathak in which certain cash was lying. The correctness of the said claim was verified and the said amount was returned to the Minor Irrigation, Zilla Parishad, Nagpur. From cross examination, it further reveals that he did not enquire in respect of fact finding committee report or correspondence regarding misappropriation of amount in the Minor Irrigation. At that time, he did not make any enquiry about insistence given by the accused regarding fact finding committee report. He is not aware whether official of the Minor Irrigation Department, Zilla Parishad namely Shri Kale, Shri Mate, and Shri Gupta were under suspension. He is not aware whether amount of Rs.10.00 lacs to 12.00 lacs was pending against companions and Shri Mate and Shri Rameshkumar Gupta under AEGS Scheme.

35. The defence of the accused is of total denial and of false implication as he initiated the action against complainant PW1 Suresh Ramteke and PW2 Rameshkumar Gupta. The accused entered into the witness box and examined himself as defence witness who testified that he took charge of the Sub Divisional Officer in Minor Irrigation Department at Ramtek on 15.7.2000. One Shri Kale was working as the Sub Divisional Engineer from whom he took the charge. However, said Shri Kale has not given him charge in writing and on 1.8.2000, he gave the charge. He suspected about financial misappropriation and started investigation. Clerk Sanghewar gave him a cash book of AEGS in August 2000. On verification of the said cash book, he found that amount Rs.12.00 lacs was withdrawn, but the same was not showing in the cash book as to whom it was given. Such advances were obtained by complainant PW1 Suresh Ramteke, PW2 Rameshkumar Gupta, Shri Mate, and Shri kale. The Chief Officer of the Zilla Parishad directed him to pursue recovery of the amount and, therefore, he issued notices to the complainant, Rameshkumar Gupta, and Mate. He even called the complainant and Rameshkumar Gupta to hand over the record, estimates, agreements, and accounts. He wrote them letter on 8.9.2000, but the complainant and Rameshkumar Gupta had not submitted documents and accounts. Shri Rameshkumar Gupta, Shri Mate and Shri Kale were subsequently suspected. They were also chargesheeted departmentally. As the action was taken, the staff was dissatisfied with him. Thereafter, the complainant and Rameshkumar Gupta made him a phone call that certain amount unpaid under AEGS Scheme was lying with them and they would refund the said amount and came to his house and handed over the said amount and he was caught. During his cross examination, he admitted that one G.K.Meshram was appointed as Enquiry Officer against the complainant and Rameshkumar Gupta. Said Meshram

gave exoneration report against the complainant and Rameshkumar Gupta. He raised an objection about finding of Shri Meshram. The work of refund of cash under AEGS Scheme is official work. Thus, the defence of the accused is that on the pretext of handing over the amount pending in the office, the complainant and Rameshkumar Gupta came to his house and handed over the amount to him.

36. Perusal of the entire evidence reveals that the accused was not represented by his Advocate. Initially, he had engaged Advocate, who failed to appear for the cross examination and, therefore, no cross order was passed and the accused was insisted to cross examine witnesses.

37. Learned counsel for the accused vehemently submitted that an opportunity was not granted to the accused to cross examine witnesses. As such, there was no fair trial by the prosecution. He submitted that though power of the Appellate Court to order retrial is also recognized in Section 386 of the Code of Criminal Procedure, order of retrial of criminal cases is made in exceptional cases and not unless the Appellate Court is satisfied that the court trying proceeding had no jurisdiction to try it or that the trial is vitiated by serious illegalities or irregularities. He further submitted that retrial can be ordered when the prosecutor or an accused was for reasons beyond their control prevented from leading or tendering evidence material to the charge and that in the interest of justice, the court can direct as to the retrial.

38. In support of his contentions, learned counsel for the accused placed reliance on the decision of the Honourable Apex Court in the case of Ajay Kumar Ghoshal and ors supra, wherein the Honourable Apex Court held that Section 386 of the Code of Criminal Procedure deals with powers of Appellate Court. As per Section 386 (b) of the Code, in an appeal from a conviction, the Appellate Court may (i) reverse finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (ii) alter the finding, maintaining the sentence, or (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same.

39. Learned counsel for the accused further submitted that "speedy trial" and "fair trial" to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Deprivation of such right would cause prejudice to the accused in defending himself. In support of his contentions, he placed reliance on the decision of the Honourable Apex Court in the case of Mohd.Hussain alias Zulfikar Ali supra wherein it has been observed that the Constitution Bench of this Court in Abdul Rehman Antulay and others vs. R.S.Nayak and another (1992)1 SCC 225 considered right of an accused to speedy trial in light of Article 21 of the Constitution and various provisions of the Code. The Constitution Bench also extensively referred to the earlier decisions of this Court in Hussainara Khatoon and others (I) vs. Home Secretary, State of Bihar (1980)1 SCC 81, Hussainara Khatoon and others (III) vs. Home Secretary, State of Bihar, Patna

(1980)1 SCC 93, Hussainara Khatoon and others (IV) vs. Home Secretary, State of Bihar, Patna (1980)1 SCC 98 and Raghubir Singh and others vs. State of Bihar (1986)4 SCC 481 and noted that the provisions of the Code are consistent with the constitutional guarantee of speedy trial. In paragraph No.25, the Honourable Apex Court observed that in Kartar Singh vs. State of Punjab (1994)3 SCC 569 it was stated by this Court that no doubt liberty of a citizen must be zealously safeguarded by the courts but nonetheless the courts while dispensing justice should keep in mind not only the liberty of the accused but also the interest of the victim and their near and dear and above all the collective interest of the community and the safety of the nation so that the public may not lose faith in the system of judicial administration and indulge in private retribution.

40. Learned counsel for the accused further relied upon the decision of the Honourable Apex Court in the case of Nasib Singh supra, wherein also while considering scope of Section 386 of the Code, it has been held that an order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the Court trying the proceeding had no jurisdiction to try it and held that a retrial would not be ordered unless the Appellate Court is satisfied that: (i) the court trying the proceeding had no jurisdiction; (ii) the trial was vitiated by serious illegalities and irregularities or on account of a misconception of the nature of the proceedings as a result of which no real trial was conducted; or (iii) the prosecutor or an accused was for reasons beyond their control prevented from leading or tendering evidence material to the charge and that in the interest of justice, the Appellate Court considers it appropriate to order a retrial.

Another feature which emerges from the above decision is that an order of retrial wipes out from the record the earlier proceeding and exposes the present accused to another trial. It is for that reason that the court has affirmed the principle that a retrial cannot be ordered merely on the ground that the prosecution did not produce proper evidence and did not know how to prove their case.

41. Learned counsel for the accused submitted that the Honourable Apex Court, in the case of Mohd.Hussain alias Zulfikar Ali supra, observed that accused did not have aid of counsel in any real sense, although, he was as much entitled to such aid during period of trial. The record indicates that the appointment of learned counsel and her appearance during the last stages of the trial was rather proforma than active participation. It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case, to confront the witnesses against him not only on facts but also to discredit the witness by showing that his testimony-in-chief was untrue.

Learned counsel for the accused submitted that similar is the case in present matter. The counsel engaged did not turn for cross examination despite the accused shown his disinclination to cross examine witnesses. He was asked to cross examine. The accused is not legal expert and, therefore, he is not aware

about any pros and cons of the legal system.

42. Learned counsel for the accused submitted that the Honourable Apex Court in the case of Mohd.Hussain alias Zulfikar Ali supra referred the decision of its two-Judge Bench in the case of Zahira Habibulla H.Sheikh and another vs. State of Gujarat and ors (2004)4 SCC 158 wherein it is observed that principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

43. Learned counsel for the accused submitted that in the present case, counsel of the accused had not appeared and the accused denied assistance by engaging another counsel. Thus, prejudice is caused to the accused and, therefore, it is a fit case wherein the trial is to be remanded back by giving the accused sufficient opportunity.

44. As observed by the Honourable Apex Court, every person has a right to a fair trial by a court. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result, the accused charged with a serious offence must not be stripped of his valuable right of a fair and impartial trial. To do that, would be negation of concept of due process of law. The basic principle is that the accused is presumed to be innocent till his guilt is proved and, therefore, it is duty of the court to give opportunity to have fair trial. The trial person charged with crime to have services of a lawyer is fundamental and essential to fair trial. Even, intelligent and educated men, not trained in law, have more than often no skill in the science of law if charged with crime. Such an accused not only lacks both the skill and knowledge adequately to prepare his defence. The guidance of counsel is needed for fair trial.

45. Section 386 of the Code of Criminal Procedure, deals with power of the appellate court in dealing with appeals and power to direct retrials.

46. The Honourable Apex Court in the case *Issac alias Kishore vs. Ronald Cheriyan and ors* (2018)2 SCC 278 has dealt with when powers can be exercised and observed that under Section 386(a) and (b)(i), the power to direct retrial has been conferred upon the Appellate Court when it deals either with an appeal against judgment of conviction or an appeal against acquittal (High Court). There is a difference between the powers of an Appellate Court under Clauses (a) and (b). Under Clause (b), the Court is required to touch the finding and sentence, but under Clause (a), the Court may reverse the order of acquittal and direct that further enquiry be made or the accused may be retried or may find him guilty and pass sentence on him according to law. Normally, retrial should not be ordered when there is some infirmity rendering the trial defective. A retrial may be ordered when the original trial has not been conducted satisfactorily for particular reasons like, appropriate charge not framed, evidence wrongly rejected which could have been admitted or evidence admitted which could have been rejected etc. Retrial cannot be ordered when there is a mere irregularity or where it does not cause any prejudice, the Appellate Court may not direct retrial. The power to order retrial should be exercised only in exceptional cases.

47. A three-Judge Bench decision of the Honourable Apex Court in the case of *Mohd. Hussain @ Julfikar Ali vs. The State (Govt. of NCT) Delhi* (2012)9 SCC 408 Delhi, while dealing with powers of the appellate court to order a retrial under Section 386(b) of the Code of Criminal Procedure, held that the appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.

48. The similar position was adopted by the Honourable Apex Court in the case of *Ajay Kumar Ghoshal vs. State of Bihar* (2017)12 SCC 699.

49. In view of the above discussion, as the accused was deprived of opportunity of engaging counsel and cross examine witnesses, a prejudice is caused to him. The prejudice to an accused is to be considered with reference to the above aspects. The plea of prejudice has to be in relation to the trial. Once the accused has established to show that there is a serious prejudice caused to him, as he

was not permitted to cross examine witnesses by engaging a counsel and his right of a fair trial has been defeated, he has made out a case to remand for retrial.

50. As observed by the Honourable Apex Court, fair trial is guaranteed to every citizen under Article 21 of the Constitution of India and, therefore, there is a merit in submissions of learned counsel for the accused that a prejudice is caused to the accused and it is a fit case wherein retrial can be ordered. Also, in the light of observations of the Honourable Apex Court, prompt disposition of criminal cases is to be commended. However, at the same time, negation of concept of due process of law, regardless of the merits of the appeal, would cause prejudice to the accused. It is the duty of the court to see that he is not denied right of a fair trial.

51. In the present case, not only the accused denied the assistance but also no legal aid was provided to him after his counsel failed to appear and though appeared, failed to cross examine witnesses.

52. In view of the above discussion, the judgment impugned in the appeal cannot be sustained and it requires to be reversed and the matter is to be remanded back to learned Judge of the Special Court with a direction to allow the accused to engage a counsel of his choice or learned Judge of the Special Court to provide an assistance by appointing an Advocate from Legal Aid Panel before commencement of the trial, till its conclusion. A direction is also required to be given to the accused that he shall cooperate learned Judge of the Special Court to dispose of the matter at the earliest and shall not seek unnecessary adjournments for one or other reasons.

53. In view of the above, the appeal deserves to be allowed and the conviction and sentence imposed upon the accused deserve to be quashed set aside and the matter requires to be remanded back for a fresh disposal in accordance with law by giving an opportunity to the accused to cross examine witnesses. Hence, following order is passed:

ORDER

(1) The Criminal Appeal is allowed.

(2) The judgment and order dated 4.9.2009 passed by learned Judge, Special Court (ACB), Nagpur in Special Case No.7/2002 is hereby quashed and set aside.

(3) The matter is remanded back to learned Judge of the Special Court for deciding the same afresh, in accordance with law, after giving an opportunity to the accused to cross examine witnesses already entered into witness box.

(4) Learned Judge of the Special Court shall decide the matter as expeditiously as possible and preferably within a period of six months (6 Months) from the date of receipt of the record of this matter.

(5) Learned Judge of the Special Court shall give an opportunity to both parties

to adduce evidence, if required.

(6) Parties shall co-operate learned Judge of the Special Court to finally dispose of the matter expeditiously.

The appeal stands disposed of.