

(2018) 06 OHC CK 0001
In the Orissa High Court
Case No : CRLA No.165 of 2011

DURYODHAN SAHOO

APPELLANT

Vs

REPUBLIC OF INDIA

RESPONDENT

Date of Decision : 19-06-2018

Acts Referred:

Prevention of Corruption Act, 1988 — Section 4, 7, 13, 13(2), 13(1)(d), 20
Code of Criminal Procedure, 1973 — Section 313
Indian Evidence Act, 1872 — Section 67

Citation : (2018) 06 OHC CK 0001

Hon'ble Judges : DR. D.P. CHOUDHURY

Bench : Single Bench

Advocate : B.Dasmohapatra, B.K.Bhole, A.K.Bose

Final Decision : Allowed

Judgement

Dr.D.P.Choudhury, J.Â

1. The appellant, in the captioned appeal, assails the judgment of conviction and sentence passed under Section 7 of the Prevention of Corruption Act,

1988 (hereinafter called as "the Act") to undergo rigorous imprisonment for six months and to pay a fine of Rs.1000/- (rupees one thousand) in

default to undergo rigorous imprisonment for one month more and under Section 13(2) read with Section 13(1)(d) of the Act to undergo rigorous

imprisonment for one year and to pay a fine of Rs.5000/- (rupees five thousand) in default rigorous imprisonment for three months more by the

learned Special Judge (CBI), Bhubaneswar in TR No.16 of 2007. Both the sentences were directed to run concurrently.Â

2. The infiltrated factual matrix leading to the case of the prosecution is that the appellant was working as Senior Manager in Town Services

Department of Rourkela Steel Plan (in short 'RSP'). There were unauthorized occupants in Laxmi Market near Ispat General Hospital,

Rourkela adjacent to the boundary of Nehru Maidan. The RSP Authorities removed all the unauthorized occupants from that area and prepared a list

of such occupants for the purpose of allotment of space at Laxmi Market and accordingly a census list of 218 shop owners has been prepared. The

complainant (Pabitra Mohan Sahoo) has got a betel shop on the roadside of Laxmi Market but his name does not find place in the list prepared for

allotment of shop at Laxmi Market for which he made repeated representations to the RSP Authorities but it was not successful.Â Â Â Â Â Â Â

3. It is alleged inter alia that the complainant had approached the appellant, who is allegedly looking after the allotment of space and the appellant

demanded a bribe of Rs.5000/- (rupees five thousand) as illegal gratification for the allotment of space to the complainant. Then the complainant

lodged complaint before the Central Bureau of Investigation (CBI) and accordingly a plan to trap the appellant was made. On 22.11.2006, the

complainant took ten numbers of five hundred rupee G.C. Notes after being discussed with the trap party. As per the instruction of the trap party, the

complainant along with one official witness went in a motorcycle to the office of the appellant. The witness stood near the door and the complainant

went inside. The appellant allegedly demanded the money and ten numbers of currency notes of 500 rupee, being mixed with the phenolphthalein

power in the office of the CBI earlier, was handed over by the complainant to the appellant, who counted and kept the same on the table. Thereafter,

the complainant came outside and gave pre-fix signal to the CBI officials, who have followed the complainant. Inspector of Police, CBI along with

other official witnesses entered the room of the appellant where they caught-hold the right hand of the petitioner. The petitioner fumbled and could not

give any answer. After observing all formalities of trapping, the appellant was asked to dip his right hand fingers first in the solution prepared and

when he dipped his fingers, the solution changed to pink colour. Thereafter, the post-trap memorandum was prepared. The Investigating Officer made

search of the office of the appellant and seized certain documents. After completion of the investigation, all the investigation papers were placed

before the Executive Director of Personnel and Administration, RSP, who after, application of his mind, sanctioned for prosecution of the appellant.

Thereafter, the charge-sheet has been submitted upon which the learned Special Judge (CBI), Bhubaneswar took cognizance of the offence under

Sections 7 and 13(2) read with 13(1)(d) of the Act vide order dated 7.5.2007.Â Â

4. The plea of the appellant as revealed from the statement recorded under Section 313 of the Code and the suggestions made to the prosecution

witnesses that he has been falsely implicated in this case. His specific plea is that he was thrust upon to receive the money which he has thrown on

the floor and CBI officials directed him to collect the same after which the same was seized by the CBI. His further specific plea is that he has never

demanding any money from the complainant as illegal gratification. He pleaded innocence.Â Â

5. Learned trial Court framed the charge against the present appellant, which is as under:

â??T.R.No.16 of 2007

CHARGE WITH TWO HEADS

I, Sri S.K.Mishra, M.Com. LL.B., Special Judge (C.B.I.) Bhubaneswar hereby charge you:-

1.Â Duryodhan Sahoo as follows:-

That, you on or about the 22nd day of November, 2006 at R.S.P. Rourkela being a public servant working as Sr.Manager in Town Services

Department of RSP demanded and accepted a sum of Rs.5000/- from the complainant Pabitra Mohan Sahoo as a gratification other than legal

remuneration for allotment of a space in favour of the complainant at Laxmi Market and thereby committed an offence punishable u/s 7 of the

P.C.Act, 1988 and within my cognizance.

That, you on or about the same date and place being a public servant working as Senior Manager, in Town Services Department of R.S.P., Rourkela

by corrupt and illegal means and/or by otherwise abusing your official position as such public servant obtained for yourself pecuniary advantage to the

tune of Rs.5000/- from the complainant Pabitra Mohan Sahoo to allot a space at Laxmi Market, Rourkela and thereby committed an offence

punishable U/s 13(2) r/w Sec. 13(1)(d) of the P.C.Act, 1988 and within my cognizance. And I hereby direct that you be tried by this Court on the said

charges.

Dated the 18th day of 2007

Sd/-Special Judge (CBI),

Bhubaneswar.â??

6. The prosecution has examined as many as thirteen witnesses to prove the charge levelled against the appellant and the defence, in order to

discharge the onus, has examined four witnesses. After evaluating the evidence of prosecution and defence, learned trial Judge found the appellant

guilty under Sections 7 and 13(2) read with Section 13(1)(d) of the Act and passed the order of conviction and sentence, as above.

7. SUBMISSIONS

Mr.Dasmohapatra, learned counsel for the appellant submitted that there is no evidence of dealing with allotment of space by the appellant. There is

no document exhibited by the appellant to show that the appellant has the authority to allot the space but the evidence is led to show that the D.G.M of

the company is the competent authority to allot the space and the appellant in no way connected with allotment of the said space in question. Learned

trial Court has erred in law to opine that the appellant had accepted or demanded bribe of Rs.5000/- towards allotment of space at Laxmi Market and

the same was not his legal remuneration.Â Â Â 8.Â Mr.Dasmohapatra, learned counsel for the appellant submitted that the adverse inference

should be drawn for non-examination of the material witness, i.e. charge-sheet witness no.8. The evidence of P.W.11, who is the complainant in this

case, should not be accepted as a gospel truth to prove the case of the prosecution. According to him, the statement of P.W.11 has got lot of

contradictions and conjectures. The evidence of the complainant (P.W.11) shows that on 14.11.2006, he visited the appellant, who told him to spend

some money for getting a space and when he replied that he had no money, the appellant asked him to get out. Again on 20.11.2006, P.W.11

contacted the appellant, who asked him to pay Rs.5000/- (rupees five thousand) in his office on 22.11.2006. But, the complainant has never stated in

his complaint that on 14.11.2006 the appellant has demanded any amount of money. So, the evidence of P.W.11 should be assessed with pinch of

salt.Â Â Â

9.Â It is further submitted by Mr.Dasmohapatra, learned counsel for appellant that there is no evidence to show that the applications of the

complainant were processed by the appellant or that the same were pending with the appellant on the date of allegation or that the appellant had any

authority to allot the space to the complainant for which question of demand or acceptance of the same is far from truth. In this regard, he relied on

the decision of the Honâ??ble Supreme Court in the case of T.K.Ramesh Kumar â??V- State through Police Inspector, Bangalore; (2015) 15 SCC

629. According to him, when the prosecution witnesses have not proved that the appellant has no any role to play in the matter, the demand of

gratification is out of bound. In support of this submission, he relied on the decision of the Honâ??ble Supreme Court in the case of State of Punjab

â??V- Sohan Singh; (2009) 6 SCC 444.

10. Learned counsel for the appellant contended that the overhearing witness (P.W.3) has contradicted the evidence of P.W.11 because P.W.11 has

stated that after entering into the room, the appellant enquired about demanded money and the complainant handed over the tainted currency notes to

him whereas P.W.3 stated that by seeing the complainant, the appellant asked for the money and the complainant handed over the same to him, who

accepted in his right hand. Thus, the demand of money by the appellant has not been established by consistent evidence of P.Ws.3 and 11.

11. It has been further submitted by Mr.Dasmohapatra, learned counsel for the appellant that the evidence with regard to the trap is also bleak for

which the acceptance of money by the appellant is far from truth. The trap party members, namely, Sri D.K.Kabi, P.K.Dalai, who caught-hold the

hand of the appellant and had taken the hand wash as per the post trap memorandum (Ext.6) but Sri P.K.Dalai, has not been examined by the IO

during investigation. Only Inspector of Police (P.W.12) and P.W.13 have been examined to prove the trap incidence. Even the post-trap memorandum

not contained the signature of the appellant. In such situation, the evidence of trap cannot be said to have been proved by the cogent evidence. On the

other hand, it appears from the cross-examination of P.W.3 that the currency notes were scattered on the floor and the appellant was asked to collect

the same, which rather proves the plea of defence to the effect that he was forced the acceptance of money to which he pushed away and the

currency notes fell on the floor. Thus, the evidence of acceptance of bribe or the illegal gratification is not proved by cogent, clear and consistent

evidence.Â Â Â Â

12. It has been further contended by Mr.Dasmohapatra, learned counsel for the appellant that P.W.9, who is the sanctioning authority, has no power

to accord sanction. There is no evidence of P.W.9 to show that after being satisfied with the material, he sanctioned for prosecution. There is no

record to show that P.W.9 has been entrusted to accord sanction for prosecution. When there is totally non-application of mind by appropriate

sanctioning authority, the case of the prosecution is bound to fail. In support of this submission, he relied on the decision in the case of T.K.Ramesh

Kumar (Supra).Â

13. Mr.Dasmohapatra, learned counsel for the appellant submitted that the plea of defence has been well proved by the defence witnesses as well as

and by the evidence of prosecution witnesses. The defence has proved through D.Ws.1, 2, 3 and 4 that two persons have caught-hold the hand of the

appellant at corridor and dragged him into office room, which also finds corroboration from the cross-examination of P.W.2. If at all the appellant had

accepted the bribe in his room, the question of going outside the room and dragging him into the office room has created suspicion over the case of the

prosecution. Apart from this, learned trial Court has failed to evaluate the evidence of hostile witness (P.W.10). On the other hand, learned trial Court

has not evaluated the evidence of witnesses available on record properly and has landed to a wrong conclusion that the appellant is guilty of the

offences alleged against him. So, he prayed to set aside the judgment of conviction and sentence passed against the appellant. He relied on the

decisions reported Mukhtiar Singh (since deceased) through his L.R. â?"V- State of Punjab; AIR 2017 SC 3382, P.Satyanarayana Murthy â?"V-

District Inspector of Police and another; AIR 2015 SC 3549, A.Subair â?"V- State of Kerala; (2009) 6 SCC 587, B.Jayaraj â?"V- State of Andhra

Pradesh; 2014 (I) OLR (SC) 1014, State of Punjab â?"V- Sohan Singh; (2009) 6 SCC 444, State of Himachal Pradesh â?"V- Nishant Sareen; AIR

2011 SC 404, Union of India through Inspector, CBI â?"V- Purnandu Biswas; (2005) 32 OCR (SC) 869 and T.K.Ramesh Kumar â?"V- State; (2015)

15 SCC 629.Â Â

14. Mr.A.K.Bose, learned Assistant Solicitor General for the Republic of India submitted that there are evidence of demand of gratification by the

appellant because the statements of P.Ws.1, 2 and 3 would go to show that the appellant was dealing with the files of allotment of shop rooms and the same has not been decided in any manner. Not only their evidence proved that the appellant demanded money on 14.11.2006 but also categorically demanded Rs.5000/- on 20.11.2006 as illegal gratification. If on 22.11.2006, the appellant did not disclose the amount of money but categorically asked whether the complainant brought the money or not. It certainly points out the intention of the appellant to demand gratification. So, the demand of illegal gratification being sine qua non to constitute offence under the Act is proved by the prosecution.Â Â

15. Mr.Bose, learned Assistant Solicitor General further submitted there is consistent and clear evidence of P.Ws.3, 11 and 12 to the effect that they have prepared the pre-trap memorandum with the same number of currency notes and after making the trap of the appellant, they recovered the currency notes of same number and there is no contradiction to that effect in the evidence of these witnesses. Thus, the recovery of tainted notes from the appellant is well proved by the prosecution. Learned trial Court has made five points to determine whether the prosecution has discharged the onus prima facie to show that under Section 20 of the Act, the presumption will be against the appellant. All these points have been satisfactorily answered by the learned trial Court. On the other hand, the appellant has not rebutted the presumption. So, the conclusion arrived by the learned trial Court cannot be said to be erroneous. On the other hand, since the prosecution has well proved the demand and acceptance of illegal gratification, the conviction made for the offences is proper and illegal. He also submitted that the judgment of conviction and sentence passed by the trial Judge cannot be said to be erroneous. Hence, he supported the same.

DISCUSSIONS

16. Since the appellant has been convicted under Section 7 and 13(2) read with Section 13(1)(d) of the Act, the same provisions are necessary to be quoted:

â??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, favor or disfavor 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.

Explanations.-(a) â??Expecting to be a public servant.â?If a person not expecting to be in office obtains a gratification by deceiving others into a

belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this

section.

(b) â??Gratification.â??The word â??gratificationâ?is not restricted to pecuniary gratifications or to gratifications estimable in money.

(c) â??Legal remuneration.â?The words â??legal remunerationâ?are not restricted to remuneration which a public servant can lawfully demand, but

include all remuneration which he is permitted by the Government or the organization, which he serves, to accept.

(d) â??A motive or reward for doing.â?A person who receives a gratification as a motive or reward for doing what he does not intend or is not in a

position to do, or has not done, comes within this expression.

(e) Where a public servant induces a person erroneously to believe that his influence with the Government has obtained a title for that person and thus

induces that person to give the public servant, money or any other gratification as a reward for this service, the public servant has committed an

offence under this section.

13(1)-A public servant is said to commit the offence of criminal misconduct,-

d) if he,â?

(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; or

(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.

17. The aforesaid provisions are clear enough to show that the demand of illegal gratification must be proved so that the other ingredients are to

follow.

18. It is reported in the case of Union of India (UOI) through Inspector, CBI v- Purnandu Biswas (Supra) where Their Lordships, at paragraphs-

35 and 36, have observed in the following manner:

35. The learned Additional Solicitor General submitted that onus of proof was upon the Respondent to explain as to how he came in possession of

the amount. Section 20 of the Prevention of Corruption Act, 1988 reads as under:

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) or 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.â??

36. In this case demand of illegal gratification by the Respondent has not been proved. Furthermore, Section 20 of the Act is not attracted as the

Respondent had been charged for commission of an offence under Section 13(1) (d) read with Section 13(2) of the Act.â??

19. It is reported in the case of B.Jayaraj â?"V- State of A.P; 2014 (1) OLR (SC) 1014 where Their Lordships, at paragraph-7, have observed in the

following manner:

â??7. In so far as the offence under Section 7 is concerned, it is a settled position in law that demand of illegal gratification is sine qua non to

constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all

reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down in

several judgments of this Court. By way of illustration reference may be made to the decision in C.M. Sharma Vs. State of A.P.: (2010) 15 SCC 1

and C.M. Girish Babu Vs. C.B.I; (2009) 3 SCC 779.â??

20. It is reported in the case of A.Subair â?"V- State of Kerala; (2009) 6 SCC 587 where Their Lordships, at paragraphs-30 and 31, have observed in

the following manner:

â??30â?|â?|..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.Â

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.â??

21. It is reported in the case of P.Satyanarayana Murty â?"V- District Inspector of Police and another; AIR 2015 SC 3549 where Their Lordships, at

paragraphs-20, 21, 22 and 25, have observed in the following manner:

20. In a recent enunciation by this Court to discern the imperative pre-requisites of Sections 7 and 13 of the Act, it has been underlined in B.

Jayaraj (AIR 2014 SC (Supp) 1837 (supra) in unequivocal terms, that mere possession and recovery of currency notes from an accused without proof

of demand would not establish an offence under Sections 7 as well as 13(1)(d)(i)&(ii) of the Act. It has been propounded that 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 proved. The proof of demand, thus, has been held to be an indispensable essentiality and of permeating

mandate for an offence under Sections 7 and 13 of the Act. Qua Section 20 of the Act, which permits a presumption as envisaged therein, it has been

held that while it is extendable only to an offence under Section 7 and not to those under Section 13(1)(d)(i)&(ii) of the Act, it is contingent as well on

the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was

emphasized, could follow only if there was proof of demand. Axiomatically, it was held that in absence of proof of demand, such legal presumption

under Section 20 of the Act would also not arise.Â

21. The proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1)(d)(i)&(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.Â

22. 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 Sections 7 or 13 of the Act would not entail his conviction thereunder.

25. In reiteration of the golden principle which runs through the web of administration of justice in criminal cases, this Court in Sujit Biswas vs. State

of Assam (2013) 12 SCC 406 had held that suspicion, however grave, cannot take the place of proof and the prosecution cannot afford to rest its case

in the realm of â??may beâ??true but has to upgrade it in the domain of â??must beâ??true in order to steer clear of any possible surmise or

conjecture. It was held, that the Court must ensure that miscarriage of justice is avoided and if in the facts and circumstances, two views are plausible,

then the benefit of doubt must be given to the accused.â??

22. It is reported in the case of Mukhtiar Singh (since deceased) through his L.R. â??V- State of Punjab; AIR 2017 SC 3382 where Their Lordships, at

paragraphs-15 and 25, have observed in the following manner:

â??15. In P. Satyanarayana Murthy (supra), this Court took note of its verdict in B. Jayaraj vs. State of A.P. underlining that mere possession and

recovery of currency notes from an accused without proof of demand would not establish an offence under Section 7 as well as Section 13(1)(d)(i)

and (ii) of the Act. It was recounted as well that 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 proved. Not only the proof of demand

thus was held to be an indispensable essentiality and an inflexible statutory mandate for an offence under Sections 7 and 13 of the Act, it was held as

well qua Section 20 of the Act, that any presumption thereunder would arise only on such proof of demand. This Court thus in P. Satyanarayana

Murthy (supra) on a survey of its earlier decisions on the pre-requisites of Sections 7 and 13 and the proof thereof summed up its conclusions as

hereunder:Â

â??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 therefore, 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 Sections 7 and 13 of the Act would not entail his conviction thereunder.â??

25. It would thus be patent from the materials on record that the evidence with regard to the demand of illegal gratification either of Rs.3,000/- which

had been paid or of Rs.2,000/- as made on the day of trap operation is wholly inadequate to comply with the prerequisites to constitute the ingredients

of the offence with which the original accused had been charged. Not only the date or time of first demand/payment is not forthcoming and the

allegation to that effect is rather omnibus, vague and sweeping, even the person in whose presence Rs.3,000/- at the first instance is alleged to have

been paid i.e. Santosh Singh Lamberdar, has neither been produced in the investigation nor at the trial. In other words, the bald allegation of the

complainant with regard to the demand and payment of Rs.3,000/- as well as the demand of Rs.2,000/- has remained uncorroborated. Further to

reiterate, his statement to this effect lacks in material facts and particulars and per se cannot form the foundation of a decisive conclusion that such

demand in fact had been made by the original accused. Viewed in this perspective, the statement of complainant and the Inspector Satpal, the shadow

witness in isolation that the original accused had enquired as to whether money had been brought or not, can by no means constitute demand as

enjoined in law as an ingredient of the offence levelled against the original accused. Such a stray query ipso facto in absence of any other cogent and

persuasive evidence on record 18 cannot amount to a demand to be a constituent of the offence under Section 7 or 13 of the Act.â??

23. With due regard to the aforesaid catena of decisions of the Honâ??ble Supreme Court, it is clear that for proving the offence under Section 7 and

13(1)(d) read with Section 13 (2) of the Act, the demand of illegal gratification or bribe is sine qua non to prove the charge under the said provisions of

law. Mere recovery of the amount paid by way of illegal gratification would not be enough to prove the charge or mere acceptance of any amount

allegedly by way of illegal gratification de hors the proof of demand, ip so facto could not constitute the offence under Section 7 and 13(1)(d) read

with Section 13(2) of the Act. Not only this but the evidence on the demand and acceptance of the illegal gratification must be proved beyond all

shadow of doubts. It is not enough, but the plea of the defence must be also scrutinized by the Court to find out whether the plea has been

substantiated by the evidence of preponderance of probability. No doubt, the evidence of the complainant in a trap case is like an evidence of

accomplice which requires corroboration.Â

24. Keeping in mind all these above principles, let me find out whether the prosecution has been able to prove the charge against the present

appellant.Â

25. It will not be out of place to mention that this being a criminal appeal, the appellate Court has to go to the details of fact and law involved in this

appeal. Re-appreciation of evidence by the appellate Court must be done with a touch stone of the appreciation of the evidence under law to find out

whether the finding of the learned trial Court is appropriate and proper. The appellate court should assess the evidence on record independently.

26. In this case, P.W.11 is the informant or complainant, who has alleged about demand of illegal gratification before the CBI. It is revealed from his

evidence that the Town Service Department of Rourkela under RSP was allotting space to the shop owners at Laxmi Market by making a census

after conducting a drive for removal of the unauthorized occupants. The applications were invited in 2005 and a census list was published allotting

space but the name of the informant does not find place in the census although he had a betel shop but on the date of survey, he was not present being

to the hospital. He had made several applications to the Deputy General Manager and also requested the present appellant, who being the Senior

Manager, was dealing with the file.

27. The appellant demanded Rs.5000/- to consider his application on 20.11.2006 and told him to make payment after two days, i.e., 22.11.2006. Since

he was not willing to pay, he reported the matter before the CBI Office at Rourkela vide Ext.12. Then he was asked to come on 22.11.2006 at about

9.00 am with an amount of Rs.5000/-. His evidence shows that he was asked to go with shadow witness-Kanduri Ch. Rout (P.W.3) and the CBI

officials would follow him after getting signal from the informant. He entered into the room of the appellant but P.W.3 remained near the door of the

room of the appellant. The appellant enquired about the demanded money and he handed over the tainted currency notes to him. Then, he came out

and gave signal. The CBI staff rushed to the room and caught hold the hands of the appellant where the appellant was holding the tainted currency

notes in his hand and the hand wash of the appellant was taken separately and tested in solution resulting change of colour to pink because of the

currency notes mixed with phenolphthalein power. He was cross-examined in detail.Â

28. During cross-examination, P.W.11 admitted that he came to know about the

census one day prior to the date of census and on the very day of census, he could not know as he was in hospital. But, he has not mentioned as to why he has gone to hospital. After 10 to 12 days of preparation of census, he came to know from shop-owners about preparation of such a list and tokens were issued to those person, who are having their names in the list but he was not issued with such token. He made application on 1.6.2006 about political interference in deleting his name from the census list. He has proved the application but he has not met the DGM personally. When his shop was demolished and a fresh census lit was published where his name does not find place, it is not clear as to why he was running to the appellant for allotment of space. It is true that P.W.11 must have some anxiety in the mind, lest he should approach the appellant for consideration of his application because he has no shop. But the fact remains that when he has been evicted by demolition of his shop room and there is fresh census where his name does not find place, his several application to the DGM for consideration of his application even after publication of census, the approach of P.W.11 to the appellant on several occasions for consideration of the application does not seem to be probable one to prove the gravamen of the charge of demand.

29. In paragraph-4 of his cross-examination, P.W.11 has admittedÂ that as per his instruction and dictation, one typist scribed the FIR (Ext.12) and he signed on it. He has not stated that it has been readover and explained to him. The signature of the typist is also absent on the FIR and there is no certificate to show that after going through the same or the contents of the same were readover and explained to the informant, he signed the same.

The necessary formality under Section 67 of the Indian Evidence Act to prove a document is lacking. Had it been written by the complainant himself, such formality was not required. However, he admitted in cross-examination that he has mentioned in the FIR that on 14.11.2006, the appellant demanded the bribe. But, he had not made any allegation against the appellant since 14.11.2006 about demand of such money. It shows doubt over his testimony as to why he remained silent by waiting till 20.11.2006. It is further found from his evidence that on 14.11.2006 when he expressed inability to pay any illegal gratification, the appellant abused him and told him to get out of his room. When the appellant has asked him to get out, it is not

necessary for the complainant to go again on 20.11.2006 to approach the appellant. Even if the statement of P.W.11 is considered as to demand of bribe on 20.11.2006, it does not spell out that on 20.11.2006, the appellant demanded an amount of Rs.5000/- to consider for allotment of space at Laxmi Market. Although such fact is stated in the FIR vide Ext.12, but the FIR is not the substantive evidence. But the evidence adduced in the Court is substantive evidence. The prosecutor should have at least led the evidence as to why the appellant demanded Rs.5000/- although the application for allotment of space is always made to the DGM. Not only this but also the evidence of P.W.11 is totally lacking as to demand of Rs.5000/- to grant space at Laxmi Market inasmuch as his evidence only shows that on entering to the room of the appellant on 22.11.2006, the appellant enquired about the demanded money and he handed over the same to him.Â

30. At paragraph-5 of the cross-examination, P.W.11 has categorically stated that on the day of detection, he has not requested for allotment of any space at Laxmi Market. Mere enquiry about the money without specifying the amount and the reasons for such demand would not put an accurate evidence of demand as per the decision of the Honâ??ble Supreme Court in the case of P.Satyanarayana Murthy â??V- The District Inspector of Police and others (Supra).

31. The evidence of P.W.11 so far as receipt of illegal gratification is concerned, he has denied the suggestion of the defence that he thrusting the tainted currency notes into the hands of the appellant and immediately he left the office room and the appellant chased to catch hold of him and since the appellant did not accept the currency notes, he kept the same on the corner of the table and that the currency notes fell to the ground and that when the appellant was coming outside, CBI staff caught hold of him and took him inside the office room and that the tainted notes were lying scattered on the ground and the CBI staff asked the appellant to collect the notes from the ground. Thus, the defence is stated to have suggested its plea to the informant. In cross-examination, P.W.11 admitted to have not entered his name in any register while going to the office of the appellant on that day or any other dates. If at all he was going to offer the bribe, he should have at least kept his proof of entry of his name in the entry register. Thus, the evidence of P.W.11 being not clear, cogent and consistent about

demand of illegal gratification and acceptance of the demanded money by the appellant, the same requires corroboration.

32. The evidence of P.W.3, a shadow witness, is also relevant. It is revealed from his evidence that he came to know from the Inspector and P.W.11

that the appellant demanded Rs.5000/- to allot space at Laxmi Market. As per the instruction of CBI official, he went with P.W.11 in a motorcycle

and P.W.11 entered into the room of the appellant but he stood near the door screen. The conversation between the appellant and the complainant

was audible to him. By seeing the complainant, the appellant asked for money and then the complainant handed over the money to the appellant, who

accepted the same in his right hand and counted the same in two hands. Then, the complainant came out and gave signal by combing his head.

Thereafter, others including him entered into the room. While the CBI official challenged the appellant, he fumbled and the Inspector caught hold both

the wrists of the appellant and the hands were washed separately, which turned to pink colour. In cross-examination, he admitted that he stood for half

an hour near the door and P.W.11 was inside the room for half an hour. In cross-examination, he further admitted that he has not heard any hullah

inside the room. Thus, the statement of P.W.3 is not clear enough to show that the appellant demanded Rs.5000/- for consideration of his application

for allotment of space at Laxmi Market. Also his evidence does not disclose to have witnessed about handing over of the money and acceptance of

the same by the appellant from P.W.11 as he was outside the room. So, the evidence of P.W.3 does not corroborate the evidence of P.W.11 so far as

demand of illegal gratification and acceptance of the money by the appellant from P.W.11 is concerned.

33. The evidence of P.W.2, who is another witness to have accompanied the CBI staff shows that on being called by the Inspector of CBI, he had

attended his office. The Inspector informed him that the appellant was demanding Rs.5000/- to allot a space at Laxmi Market to P.W.11 and they

intend to trap him. After going through the complaint of P.W.11, he agreed to become a member of the raiding party. It is revealed from his evidence

that they followed P.W.3 and P.W.11 in a Car and P.W.11 entered into the office of the appellant but P.W.3 remained outside the room. At 12.10,

P.W.11 came out and gave signal after which they entered into the room No.16

and found the appellant was holding the tainted money and seeing them, he kept the amount on the table. When the Inspector challenged him, he became nervous and failed to give any answer. Thereafter, the Inspector caught hold of the wrist of the appellant. Both hands of the appellant were washed separately after which the solution turned to pink. He stated to have signed on the post trap memorandum vide Ext.6/1.Â

34. In cross-examination, P.W.2 admitted that the room was not visible from the place where he was standing and he had not seen handing over of money and other transactions between P.W.11 and the appellant. The room of the appellant was a air-conditioned room and having a door closure. In cross-examination, he has further stated that the money was lying scattered on the floor and the appellant was asked to pick up the notes. If at all the money was kept by the appellant on the table after being enquired by the Inspector, why the money was scattered on the floor. On the other hand, suggestion of the defence that P.W.11 forcibly entered into the room of the appellant and thrustured the money with the appellant who chased him to outside the room and the appellant has never demanded or received any money is denial by him. On the other hand, the plea of the defence that P.W.11 thrustured the money to the appellant which he did not receive and money was scattered on the floor which he was asked to pick up is somewhat real from the cross-examination of P.W.2.

35. The evidence of P.W.12 is also relevant to note as he is the trapping IO of the case. It is revealed from his evidence that the informant and the accompanied witness entered into the room of the appellant by walk. After getting signal from P.W.11, they all rushed into the office chamber of the appellant and thereafter, he disclosed the identity of the trap party members. He challenged the appellant to have demanded and accepted Rs.5000/- for allotment of a space in favour of P.W.11 at Laxmi Market, but the appellant fumbled. The appellant has kept the currency notes on the table, which he was holding. Hand wash of the appellant was taken separately and tested in solution resulting change of colour to pink. Samples were preserved and tainted notes were seized. Then the post trap memorandum was prepared vide Ext.6. But, there is no seizure list showing seizure of the tainted notes from the possession of the appellant. From his cross-examination, it is revealed that he has received the complaint on 21.11.2006 but the

case was registered on 22.11.2006 at 9.00 am and after receiving telephonic instruction, he arranged for trapping. The question does not arise as to he

has received telephonic instruction or not but the fact remains that when in the evening on 21.11.2006, he got the FIR but registered on 22.11.2006 at

9.00 am and at the same time, he got telephonic conversation. A doubt arises in the mind as to fairness of the trap. However, in further cross-

examination, he admitted that he has not enquired about the demand of bribe on 14.11.2006 from the informant and delay in approaching him.

Moreover, his evidence shows that P.W.3 entered into the room along with P.W.11 but the evidence of P.W.3 and P.W.11 are clear to show that

P.W.3 was remained outside the room. If at all P.W.12 is the trapping IO, how there will be so much contradictions as to the presence of P.W.3 on

the point of detection or trap. From his cross-examination, it is also clear that while he entered into the room, no outsider was present in that room. He

denied the suggestion of the defence to the effect that the appellant was chasing the informant and shouting that the informant was trying to give him

money, that they caught hold the appellant and then took him to his office room and found that the money was scattered on the floor where the

appellant was forced to lift the currency notes and after lifting the same, hand of the appellant was washed and tested.

36. Not only this but also the evidence of P.W.12 is very crucial. At paragraph-4 of his cross-examination, he has stated that he has not enquired

relating to the claim of the informant that he had applied for allotment of a shed at Laxmi Market. Being the principal IO, the cause of demand of

bribe or illegal gratification, being the genesis of the crime, should have been enquired by him to trap the appellant. However, the evidence of P.W.12

is equally not clear and cogent to lay the claim of fair investigation. The trap for acceptance of money without any investigation on demand will not

make out a case of acceptance of illegal gratification or gravamen of the charge leveled against the appellant.Â

37. It is revealed from the evidence of P.W.6, who has undergone training to examine chemicals, that he has received the material object for

examination and gave his opinion vide Ext.10. But in cross-examination, he admitted that the material objects do not have a seals of forwarding

authority and there was no signature of any person on the paper. His evidence is contradicting the evidence of P.W.12 because he has stated that

after preparation M.Os.I, II, III and IV, the same were sealed and signature of the witnesses were obtained. Absence of such seal over the M.Os, raised also a doubt in the mind as to the fairness of the investigation including preparation of material object. It must be made clear that fair trial includes the fair investigation.Â

38. P.W.1 was working as Junior Manager, Town Service Department of RSP. According to him, the census work was conducted vide Ext.1/1 and

accordingly tokens were issued to 218 shop owners for identification and application forms were issued on submission of token for rehabilitation. He

has stated that 195 persons applied for allotment of space out of which 189 persons were allotted space after they deposited the fees. In cross-

examination, he admitted that name of the informant was not there in the census list. He, however, admitted that 15.6.2006 was the cut-off date for

issue of application and 5.5.2006 was the previous cutoff date for receiving the application. Thus, it is clear that neither the appellant was the

competent authority to allot space nor the name of the complainant was in the list of the census so that the demand of bribe would be made by the

appellant from the informant. It is true that the informant has made applications one after another addressing the DGM vide Ext.3 series and the same

was endorsed by DGM to AGM and then to the appellant after which it goes to P.W.1 but he stated that the application was not put before him. In

cross-examination, he admitted that the applications, marked to him by his officers, were also marked to his juniors as per the procedure and note-

sheet was maintained in Ext.3. So, the evidence of P.W.1 is not clear whether his office has put up the file to him or not but it has been marked to

him. Frailty in conduct does not ip so facto show the intention. However, when there is no competency of the appellant to allot the space, the name of

complainant is not there in the list and there is no proof that he has applied by purchasing application form at the cost of Rs.200/- as per the case of

the prosecution, the nucleus of the crime to demand bribe remains far from the truth.

39. Similarly, the evidence of P.W.4, who was working in the same Department of the appellant, reveals that there is a register maintained vide Ext.2

under which list has been prepared vide Ext.1/1. The applications of other person except the listed persons are not valid. Since the list does not contain

the name of the informant, the approach of the informant to the appellant for allotment of space near Laxmi Market is shrouded with doubts and conjectures.Â

40. It is revealed from the cross-examination of P.W.5 that on 22.11.2006, he heard from Mr.B.K.Rout that some people caught hold the appellant

and he went there and saw that the appellant was at the corridor. Two persons were holding his hand and then the appellant was taken to his room.

He accompanied the CBI inside the room along with the appellant. Thus, in the cross-examination, the plea of the defence that the appellant was

thrusted with the tainted money and he chased the informant but the CBI official caught hold his hand and dragged him to his room is well ventilated

from the cross-examination of the prosecution. The defence is always required to prove its plea either through crossexamination to the witnesses of

the prosecution or by adducing defence witnesses. Â

41. P.W.7 is a shopkeeper of Laxmi Market. He gave his ignorance about the informant. He has been cross-examined by the prosecution and during

cross-examination by the prosecution, he stated to have not stated before the IO that the betel shop of the informant adjoins to his shop and the

informant approached the Town Planning Authority on several occasions to settle him at Laxmi Market. In cross-examination by the defence, he

stated that he has a cabin at Nehru Maidan and his shop was in between the shop of Siba Das and Narendra Bag. On the other hand, his evidence

does not show about existence of the shop of the informant in Nehru Madian. Even if he is hostile to the prosecution, his evidence being taken into

consideration as a whole, only shows that he has got a shop at Nehru Maidan but existence of shop of the informant is not proved by him. Similarly,

the evidence of P.W.8 reveals that on the date of census, he was present. He expressed his ignorance about the informant. In crossexamination by

the prosecution, he denied to have stated before the I.O. that the complainant has a betel shop at Nehru Maidan and on 20.04.2005, he was absent in

his shop and due to his absence, his name was not there in the list for which the informant approached the Town Service Department for allotment of

a space. In cross-examination by the defence, he stated that he has applied in the prescribed form by purchase the same at the cost of Rs.200/-. He

was removed from Nehru Maidan and provided a space at Laxmi Market. His

evidence, if read as a whole, does not disclose about presence of any shop of the informant in Nehru Maidan. Rather, his evidence is clear to show that Town Service Department has issued the application on payment of Rs.200/- and he is one of the beneficiary of that system.Â

42. From the evidence of P.W.10, who was working as Senior Land Officer, RSP, Rourkela and involved in preparation of the census list, it reveals that he proved the census list vide Ext.1/1. According to him, the list does not contain the name of the informant. Rather, he denied about any complaint of the complainant before him about non-inclusion of his name in the census list.Â

43. In view of the discussion made hereinabove, it appears that the prosecution has not proved the charge by clear, cogent and consistent evidence

about the existence of the shop of the informant at Nehru Maidan and it was demolished so as to lay a claim for allotment of space at Laxmi Market.

It is clear that the name of the informant was not there for which he has made application to the DGM time and again. It is reiterated that when the

purpose of demand of illegal gratification or the nucleus of the crime is not proved, the question of demand of bribe remains as secondary issue. It is

patent from the evidence, as discussed above, that demand of bribe of Rs.5000/- has not been cogent, consistent and clear evidence. The acceptance

of bribe is equally has not been proved with positive and tangible evidence. Even if Sections 4 and 20 of the Act are taking into consideration, the

presumption would be available if the fact of demand and acceptance are proved beyond all shadow of doubts.Â

44. Even if the presumption under the provision of Sections 4 and 20 of the Act are considered, the plea of the defence should also to be taken into

consideration. As discussed above, the defence has brought out through cross-examination of the prosecution witnesses that he was forcibly thrust

with the money by the appellant and when he chased the appellant, the CBI staff caught hold of him and money was thrown on the floor and it was

collected by the appellant on being asked by the CBI staff. This part of evidence is also proved by the D.Ws.1, 2, 3 and 4 who are also officials of

RSP because their evidence would go to show that after having heard about hullah in the corridor, they went to the spot and found the CBI staff were

catching both hands of the appellant and taking him to his chamber and the

money was scattered on the floor and the appellant was asked to collect the same. Thus, the defence has also proved the plea by preponderance of probability.

45. In view of the fact and legal position, as discussed above, applying the decisions of the Honâ??bel Supreme Court in the above referred cases,

learned trial Court is found to have never travelled to the assessment of the evidence of all witnesses with proper perspective. Thus, the finding of the

learned trial Court is hardly to be agreed with.

46. When demand and acceptance of money is not proved and the plea of the defence is otherwise proved, the ingredients of Section 7 and 13 of the

Act remained far from proof. Hence, the judgment of conviction and sentence dated 9.3.2011 passed by the learned Special Judge (C.B.I.),

Bhubaneswar in TR No.16 of 2007 is set aside. The appellant is found not guilty under Section 7 and 13(2) read with Section 13(1)(d) of the Act and

acquitted of said charges and accordingly, he is discharged from the bail bond. The CRLA is allowed accordingly.Â Â Â Â Â Â Â